SAL

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, on behalf of the Secretary of Veterans Affairs, Plaintiff, v. BILLY E. BROOMHALL, JR. aka BILLY EDWARD BROOMHALL, JR.; GINGER BROOMHALL aka Ginger R. Broomhall aka Ginger Renee Broomhall aka Ginger Ramey; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	) CIVIL ACTION NO. 98-CV-704-BU (J)

FILED

JAN 7 1999 SAL

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE 1/8/99

ORDER OF SALE

UNITED STATES OF AMERICA TO: U.S. Marshal for the Northern District of Oklahoma

On December 15, 1998, the United States of America recovered judgment in rem against the Defendants, Billy E. Broomhall, Jr. aka Billy Edward Broomhall, Jr. and Ginger Broomhall aka Ginger R. Broomhall aka Ginger Renee Broomhall aka Ginger Ramey, in the above-styled action to enforce a mortgage lien upon the following described property:

> The West Fifty (50) feet of the South One Hundred Twenty-seven and Five-tenths (127.5) feet of Lot Forty-four (44), of SPRINGDALE ACRE LOT ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the Recorded Plat thereof.

The amount of the judgment is the sum of $13,710.19, plus administrative charges in the amount of $532.00, plus penalty charges in the amount of $38.88, plus accrued interest in the amount of $1,429.40 as of December 8, 1997, plus interest accruing thereafter at the rate of 10 percent per annum until judgment, plus interest thereafter at the current legal

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CJ

rate of 4.513 percent per annum until fully paid, plus the costs of this action in the amount of $10.00 (fee for recording Notice of Lis Pendens), plus any other advances. The judgment further provides that the mortgage on the above-described property is foreclosed, and that all Defendants and all persons claiming under them are barred from claiming any right, title, interest, and equity in the property. If Defendants, Billy E. Broomhall, Jr. aka Billy Edward Broomhall, Jr. and Ginger Broomhall aka Ginger R. Broomhall aka Ginger Renee Broomhall aka Ginger Ramey, should fail to satisfy the in rem judgment to the Plaintiff, the judgment provides that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the property according to Plaintiff's election with or without appraisement and to apply the proceeds to the payment of the costs of the sale and the Plaintiff's judgment. Any residue is to be paid to the Court Clerk to await further order of this Court.

THEREFORE, this is to command you to proceed according to law, to advertise and sell, with appraisement, the above-described real property and apply the proceeds thereof as directed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the United States District Court for the Northern District of Oklahoma, in my office in the City of Tulsa, Oklahoma, on the 7th day of January, 1999.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By _____
Deputy

Order of Sale
Case No. 98-CV-704-BU (J) (Broomhall)

CDM:cas

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 7 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

DALE DWAYNE BRATTON,

Plaintiff,

vs.

LORI, INC.; THE NORDAM GROUP, INC.; UNUM CORPORATION; and UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendants.

Case No. 98-CV-333-BU (J)

ENTERED ON DOCKET
DATE 1/8/99

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

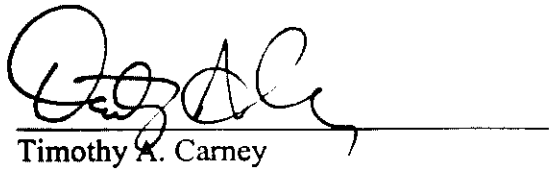
Plaintiff, Dale Dwayne Bratton, and Defendants, LORI, Inc., The Nordam Group, Inc., UNUM Corporation and UNUM Life Insurance Company of America, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby jointly stipulate for the dismissal of this cause with prejudice.

DATED: January 6, 1999

Bradley A. Gungoll, Esq.
GUNGOLL, JACKSON, COLLINS & BOX, P.C.
P. O. Box 1549
Enid, Oklahoma 73702

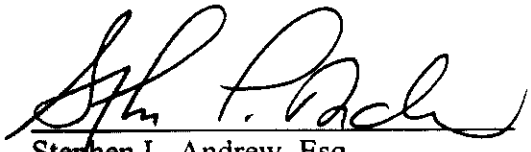
ATTORNEYS FOR PLAINTIFF

176398



Timothy A. Carney
GABLE & GOTWALS
15 W. 6th Street, Suite 2000
Tulsa, OK 74119

ATTORNEYS FOR DEFENDANT,
UNUM Life Insurance Company of America



Stephen L. Andrew, Esq.
STEPHEN L. ANDREW & ASSOC.
125 West Third Street
Tulsa, Oklahoma 74103

ATTORNEYS FOR DEFENDANTS,
Nordam Group, Inc., and LORI, Inc.

Certificate of Mailing

I hereby certify that on the 7th day of January, 1999, a true, exact and correct copy of the above and foregoing instrument was mailed, with proper postage thereon fully prepaid, to:

Bradley A. Gungoll, Esq.
GUNGOLL, JACKSON, COLLINS & BOX, P.C.
P. O. Box 1549
Enid, Oklahoma 73702

Stephen L. Andrew, Esq.
STEPHEN L. ANDREW & ASSOC.
125 West Third Street
Tulsa, Oklahoma 74103

Timothy A. Carney

176398

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, on behalf of the Secretary of Housing and Urban Development, Plaintiff, v. THE UNKNOWN HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS OF LEE W. JENKINS aka Lee Wallace Jenkins, Deceased; CHARLES W. JENKINS, JR.; STATE OF OKLAHOMA ex rel. Oklahoma Tax Commission; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	FILED JAN 7 1999 Phil Lombardi, Clerk U.S. DISTRICT COURT ENTERED ON DOCKET DATE 1/8/99 CIVIL ACTION NO. 98-CV-438-C (M)

ORDER OF SALE

UNITED STATES OF AMERICA TO: U.S. Marshal for the Northern District of Oklahoma

On December 15, 1998, the United States of America recovered judgment in rem against all named and unnamed Defendants in the above-styled action to enforce a mortgage lien upon the following described property:

> Lot Sixteen (16), Block Six (6) SUNRISE TERRACE, addition to the City of Tulsa, Tulsa County, State of Oklahoma according to the recorded Plat thereof.

The amount of the judgment is the sum of $59,480.38, plus administrative charges in the amount of $1,740.42, plus penalty charges in the amount of $1,985.97, plus accrued interest in the amount of $48,847.54 as of March 20, 1998, plus interest accruing thereafter at the rate of 12.5 percent per annum until judgment, plus interest thereafter at the

current legal rate of 4.513 percent per annum until fully paid, plus the costs of this action accrued and accruing, plus any other advances. The judgment further provides that the mortgage on the above-described property is foreclosed, and that all Defendants and all persons claiming under them are barred from claiming any right, title, interest, and equity in the property. If Defendants should fail to satisfy the in rem judgment to the Plaintiff, the judgment provides that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the property according to Plaintiff's election with or without appraisement and to apply the proceeds to the payment of the costs of the sale, the judgment of the Plaintiff, United States of America, and the judgment of Defendant, County Treasurer, Tulsa County, Oklahoma. Any residue is to be paid to the Court Clerk to await further order of this Court.

THEREFORE, this is to command you to proceed according to law, to advertise and sell, with appraisement, the above-described real property and apply the proceeds thereof as directed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the United States District Court for the Northern District of Oklahoma, in my office in the City of Tulsa, Oklahoma, on the 7 day of Jan, 1999.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By _____
Deputy

Order of Sale
Case No. 98-CV-438-C (M) (Jenkins)

LFR:cas

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, on behalf of the Secretary of Housing and Urban Development, Plaintiff, v. THE UNKNOWN HEIRS, EXECUTORS, ADMINISTRATORS, DEVISEES, TRUSTEES, SUCCESSORS AND ASSIGNS OF ELLEN K. FLEAR aka Ellen Kimball Flear, Deceased; HOWARD C. WHITE; JOANN GRANBERRY WHITE; STATE OF OKLAHOMA ex rel. Oklahoma Tax Commission; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	) CIVIL ACTION NO. 98-CV-0437-K (J)

ORDER OF SALE

UNITED STATES OF AMERICA TO: U.S. Marshal for the Northern District of Oklahoma

On December 18, 1998, the United States of America recovered judgment in rem against all named and unnamed Defendants in the above-styled action to enforce a mortgage lien upon the following described property:

> Lot Ten (10), J.M. GILLIAN RESUBDIVISION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The amount of the judgment is the sum of $45,324.28, plus administrative charges in the amount of $90.48, plus penalty charges in the amount of $546.29, plus accrued interest in the amount of $11,930.69 as of January 29, 1997, plus interest accruing thereafter

at the rate of 8.75 percent per annum until judgment, plus interest thereafter at the current legal rate of 4.513 percent per annum until fully paid, plus the costs of this action accrued and accruing, plus any other advances. The judgment further provides that the mortgage on the above-described property is foreclosed, and that all Defendants and all persons claiming under them are barred from claiming any right, title, interest, and equity in the property. If the Defendants should fail to satisfy the in rem judgment to the Plaintiff, the judgment provides that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the property according to Plaintiff's election with or without appraisement and to apply the proceeds to the payment of the costs of the sale and the Plaintiff's judgment. Any residue is to be paid to the Court Clerk to await further order of this Court.

THEREFORE, this is to command you to proceed according to law, to advertise and sell, with appraisement, the above-described real property and apply the proceeds thereof as directed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the United States District Court for the Northern District of Oklahoma, in my office in the City of Tulsa, Oklahoma, on the 7th day of January, 1999.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By _____
Deputy

Order of Sale
Case No. 98-CV-0437-K (J) (Flear)

LFR:cm

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

M. BEN SIMPSON; CHERYL SIMPSON; and S & S INVESTMENTS, L.L.C., a Colorado limited liability company, Plaintiffs, vs. GARY VENABLE, d/b/a VENABLE INVESTMENT PROPERTIES, d/b/a VIP PROPERTIES, d/b/a VENABLE INSURANCE, Defendant.	)	FILED JAN 07 1999 Phil Lombardi, Clerk U.S. DISTRICT COURT Case No. 96-C-851-K ENTERED ON DOCKET DATE 1/8/99

JOINT STIPULATION OF DISMISSAL WITHOUT PREJUDICE

The Plaintiffs, M. Ben Simpson, Cheryl Simpson and S & S Investments, L.L.C., by and through their attorneys, Paul R. Tom, and Matthew J. Browne, and the Defendant, Gary Venable, an individual, by and through his attorney, B. Jack Smith, hereby stipulate under Rule 41 of the Federal Rules of Civil Procedure, to dismiss the above captioned action, including all of the Plaintiffs' claims and all of the Defendant's counterclaims, without prejudice to refiling the same. In support of this Stipulation and so that the record is clear, none of the Plaintiffs' claims and none of the Defendant's counterclaims has been previously dismissed in any court of the United States or of any state. Therefore, this dismissal is not an adjudication on the merits as stated in Rule 41 of the Federal Rules of Civil Procedure. This joint stipulation of dismissal without prejudice shall become effective on the date it is filed.

IT IS SO STIPULATED BETWEEN THE PARTIES this 6th day of January, 1999.

B. Jack Smith, OBA #8317
1437 South Boulder, Suite 900
Tulsa, Oklahoma 74119
Tel: (918) 582-3191
Attorney for Defendants

Paul R. Tom OBA #9049
2727 East 21st Street, Suite 304
Tulsa, Oklahoma 74114
Tel: (918) 743-2000
Fax: (918) 749-8803
Attorney for Plaintiffs

Matthew J. Browne, OBA 14682
124 East 4th Street, Suite 203
Tulsa, Oklahoma 74103
Tel: (918) 583-9949
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DALE DWAYNE BRATTON,

Plaintiff,

vs.

LORI, INC.; THE NORDAM GROUP, INC.; UNUM CORPORATION; and UNUM LIFE INSURANCE COMPANY OF AMERICA,

Defendants.

Case No. 98-CV-333-BU (J)

ORDER OF DISMISSAL WITH PREJUDICE

Plaintiff, Dale Dwayne Bratton, and Defendants, LORI, Inc., The Nordam Group, Inc., UNUM Corporation and UNUM Life Insurance Company of America having stipulated to the dismissal of this action with prejudice, pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Court finds that this action shall be and hereby is dismissed with prejudice to the refiling thereof.

DATED this 7th day of January, 1999.

Honorable Michael Burrage
United States District Judge

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ENTERED ON DOCKET
DATE 1-8-99

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 07 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

MARIE M. BONTEMPS,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

CASE NO. 98-CV-546-M

JUDGMENT

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 7th day of JAN., 1999.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARIE M. BONTEMPS,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner of the Social Security Administration,

Defendant.

Case No. 98-CV-546-M

ORDER

Upon the motion of the **defendant**, Commissioner of the Social Security Administration, by Stephen C. **Lewis, United** States Attorney of the Northern District of Oklahoma, through Phil Pinnell, **Assistant** United States Attorney, and for good cause shown, it is hereby ORDERED that **this case** be remanded to the Commissioner for further administrative action pursuant to **sentence 4** of section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

DATED this 7th day of JAN. 1999.

Frank H. McCarthy
FRANK H. McCARTHY
United States Magistrate Judge

n

SUBMITTED BY:

STEPHEN C. LEWIS
United States Attorney

PHIL PINNELL, OBA #7169
Assistant United States Attorney
333 West 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
JAN - 7 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

CHARLOTTE CLARK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 98-C-271-H
	)	
ALLSTATE INSURANCE COMPANY,	)	ENTERED ON DOCKET
	)	DATE 1/8/99
Defendant.	)	

PLAINTIFF'S STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, **Charlotte Clark**, pursuant to F.R.C.P., Rule 41 and files this Stipulation of Dismissal Without Prejudice against Defendant Allstate Insurance Company. This dismissal is without prejudice to refiling. Defendant Lance Newman has previously been dismissed pursuant to settlement.

Respectfully submitted,

By: _____
Mike Jones, OBA #4821
Alan Souter, OBA #15846
JONES LAW OFFICE
116 North Elm
Bristow, Oklahoma 74010
(918) 367-3303
(918) 367-5856 Fax

and

Michael S. Loeffler, OBA #12753
LOEFFLER, ALLEN & HAM
116 West 6th
Post Office Box 567
Bristow, Oklahoma 74010
(918) 367-3331

CO-COUNSEL FOR PLAINTIFF

Rick Horton

~~A. Laurie Koller, OBA#16857~~ Rick Horton #15203
5800 E. Skelly Drive, Suite 300
Tulsa, Oklahoma 73135-6440
918-665-2247
ATTORNEY FOR DEFENDANT
Allstate Insurance Company

SAZ

UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

FILED in
JAN 6 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

YELLOW FREIGHT SYSTEM, INC., an Indiana Corporation,	)	
Plaintiff,	)	
vs.	)	**Case No. 98CV 0874C(J)**
LEONARD MOUNTAIN TRADING COMPANY, an Oklahoma Corporation, FRED C. BERCKEFELDT and DEBORAH E. BERCKEFELDT, jointly and severally,	)	
Defendants.	)	

ENTERED ON DOCKET
DATE JAN 07 1999

DISMISSAL

Comes now the Plaintiff, and hereby dismisses the above-entitled cause, with prejudice to a future action.

Dated this 6th day of January, 1999.

By: _____

James D. Moore
James R. Lieber
James D. Moore & Associates
427 South Boston Avenue
Suite 2200
Tulsa, OK 74103
(918) 585-3575

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C/J
01B

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 98CV784B(E)
	)	
MICHAEL GUILLORY,	)	
	)	
Defendant.	)	

NOTICE OF DISMISSAL

COMES NOW the United States of America by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, Plaintiff herein, through Loretta F. Radford, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 6th day of January, 1999.

UNITED STATES OF AMERICA

Stephen C. Lewis
United States Attorney

Loretta F. Radford

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
333 W. 4th Street, Suite 3460
Tulsa, Oklahoma 74103-3809
(918) 581-7463

CERTIFICATE OF SERVICE

This is to certify that on the 6th day of January, 1999, a true and correct copy of the foregoing was mailed, postage prepaid thereon, to: Michael Guillory, 2419 E. Skelly Dr., Tulsa, OK 74103.

Libbi L. Felty

Libbi L. Felty
Paralegal Specialist

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THRIFTY RENT-A-CAR SYSTEM, INC., an Oklahoma corporation,	)	
Plaintiff,	)	
v.	)	**Case No. 98 CV 0075C(M)**
SERVICE LINKS INTERNATIONAL INC., a New York corporation, SUDHAKAR R. VADDI, an individual, NAGENDRA PRASAD KAZA, an individual, and SATYA N. NALLAMOTHU, an individual,	)	
Defendants.	)	

NOTICE OF DISMISSAL

Plaintiff, Thrifty-Rent-A-Car System, Inc., by and through its attorneys, Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C., hereby dismisses this action pursuant to Fed.R.Civ.P. 41(a)(1) without prejudice. Plaintiff attempted to have a Joint Stipulation of Dismissal filed as reported to the Court. However, Defendants would not agree to a dismissal without prejudice. This Notice of Dismissal is proper pursuant to Fed.R.Civ.P. 41(a)(1) as the Defendants have not filed an answer or a motion for summary judgment.

Dated this 6th day of January, 1999.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

By: _____

Steven W. Soulé, OBA#13781
320 South Boston, Suite 400
Tulsa, Oklahoma 74103
(918) 594-0466
(918) 594-0505 (Fax)

ATTORNEYS FOR PLAINTIFF THRIFTY RENT-A-CAR SYSTEM, INC.

CERTIFICATE OF SERVICE

I, Steven W. Soulé, hereby certify that on the 6th day of January, 1999, I caused to be deposited in the United States Mail, with proper postage affixed thereon, a true and correct copy of the foregoing instrument to:

Mary Jo S. Korona
Lawrence, Werner, Kesselring, Swartout
& Brown, L.L.P.
700 First Federal Plaza
28 East Main Street
Rochester, NY 14614

_____

SWS-9098.WPD

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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, on behalf of the Secretary of Veterans Affairs, Plaintiff, v. SHARON L. SALISBURY WASHINGTON aka Sharon Washington aka Sharon Salisbury aka Sharon L. Salisbury, a single person; DELORISE A. RENFRO; SPOUSE, IF ANY, OF DELORISE A. RENFRO; THE TULSA DEVELOPMENT AUTHORITY OF TULSA, OKLAHOMA; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, Defendants.	) CIVIL ACTION NO. 98-CV-0455-K (J)

FILED
JAN 7 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE 1/7/99.

ORDER OF SALE

UNITED STATES OF AMERICA TO: U.S. Marshal for the Northern District of Oklahoma

On December 18, 1998, the United States of America recovered judgment in rem against the Defendant, Sharon L. Salisbury Washington aka Sharon Washington aka Sharon Salisbury aka Sharon L. Salisbury, a single person, in the above-styled action to enforce a mortgage lien upon the following described property:

> Lot Eight (8), Block One (1), YAHOLA HEIGHTS ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The amount of the judgment is the sum of $4,845.88, plus administrative charges in the amount of $590.00, plus penalty charges in the amount of $20.16, plus accrued interest in the amount of $357.02 as of July 22, 1996, plus interest accruing thereafter at the rate of 7 percent per annum until judgment, plus interest thereafter at the current legal rate of

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CLJ

4.513 percent per annum until paid, plus the costs of this action in the amount of $10.00 (fee for recording Notice of Lis Pendens), plus any other advances. The judgment further provides that the mortgage on the above-described property is foreclosed, and that all Defendants and all persons claiming under them are barred from claiming any right, title, interest, and equity in the property. If Defendant, Sharon L. Salisbury Washington aka Sharon Washington aka Sharon Salisbury aka Sharon L. Salisbury, a single person, should fail to satisfy the in rem judgment to the Plaintiff, the judgment provides that an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell the property according to Plaintiff's election with or without appraisement and to apply the proceeds to the payment of the costs of the sale; the judgment of Defendant, County Treasurer, Tulsa County, Oklahoma; the judgment of the Plaintiff, United States of America; and the judgment of Defendant, The Tulsa Development Authority of Tulsa, Oklahoma. Any residue is to be paid to the Court Clerk to await further order of this Court.

THEREFORE, this is to command you to proceed according to law, to advertise and sell, with appraisement, the above-described real property and apply the proceeds thereof as directed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the United States District Court for the Northern District of Oklahoma, in my office in the City of Tulsa, Oklahoma, on the 7th day of January, 1999.

PHIL LOMBARDI, Clerk
United States District Court for
the Northern District of Oklahoma

By _____
Deputy

Order of Sale
Case No. 98-CV-0455-K (J) (Salisbury)
CDM:cse

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEY ENERGY RESOURCES, INC.,
Appellant,
vs.
LORI ANN MERRILL, now PETTUS,
Appellee.

No. 98-CV-623-K

O R D E R

On December 14, 1998, Magistrate Judge Eagan entered her Report and Recommendation regarding this appeal from the Bankruptcy Court. The Magistrate Judge recommended the appeal be denied. No objection has been filed to the Report and Recommendation and the ten-day time limit of Rule 72(b) F.R.Cv.P. has passed. The Court has also independently reviewed the Report and Recommendation and sees no reason to modify it.

It is the Order of the Court that the Order of the Bankruptcy Court below, deeming the claim against appellee for slander of title to be dischargeable, is hereby AFFIRMED. This Order constitutes a final order in 98-CV-623-K.

ORDERED this 5 day of January, 1999.

TERRY C. KERN, Chief
UNITED STATES DISTRICT JUDGE

4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RUFORD HENDERSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	ENTERED ON DOCKET
	)	
AMR CORPORATION, AMERICAN AIRLINES, INC. and THE SABRE GROUP, INC.,	)	DATE JAN 07 1998
	)	
	)	**Case No. 97-CV-457-K(E)**
Defendants.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

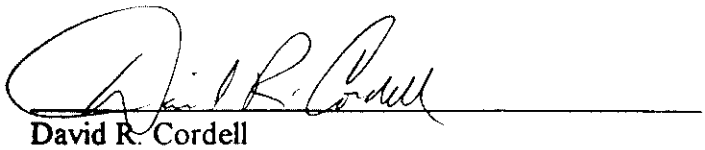
Pursuant to Fed. R. Civ. P. 41, Plaintiffs and Defendants hereby stipulate to the dismissal, with prejudice, of the claims of the following Plaintiffs as against the following Defendants.

1. Plaintiffs Lavana Abair, Marie Bontemps, Barbara Elliot, Opal Harris, Melvy Haynes, Deborah Holt, Helen Perkins, and Ann Watson dismiss all their claims as against Defendant The SABRE Group, Inc., with prejudice.

Martin & Associates, P.C.
Attorneys for Plaintiffs

C. Rabon Martin, OBA #5718
403 S. Cheyenne Avenue
The Martindale Penthouse
Tulsa, Oklahoma 74103
(918)587-9000 telephone
(918)587-8711 facsimile

Connor & Winters
Attorneys for Defendants



David R. Cordell
3700 First Place Tower
15 E. Fifth Street
Tulsa, OK 74103-4344
(918) 586-5711 telephone
(918) 586-8547 facsimile

a:\sbg22\aa.stipofdisml

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

CHARLES WHITESIDE, Plaintiff, vs. FLINT INDUSTRIES, BOILER MAKERS UNION LOCAL 580, Defendants.	)	Case No. 98CV-0513H

STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Charles Whiteside, and Defendant Flint Industries, pursuant to Fed. Rule Cov. Pro. 41(a)(1), stipulate to a dismissal with prejudice the above-styled action in its entirety as to all claims against Defendant, Flint Industries, Inc., and its successors and affiliates.

DATED this 5th day of January, 1999.

Respectfully submitted,

Gerald Lovoi
Attorney at Law
324 South Main, #900
Tulsa, Oklahoma 74103

ATTORNEY FOR CHARLES WHITESIDE

and

Timothy T. Trump, OBA No. 10684
CONNER & WINTERS
3700 First Place Tower
15 East 5th Street
Tulsa, Oklahoma 74103-4344

ATTORNEY FOR FLINT INDUSTRIES, INC.

SAC

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

JAN 6 1999

Phil Lombardi, Clerk
U.S. DISTRICT COURT

ROGER D. BAILEY,

Plaintiff,

v.

SOUTH KANSAS AND OKLAHOMA RAILROAD, INC., a Kansas corporation,

Defendant.

Case No. 97-CV-612-B(M)

JURY DEMAND

ENTERED ON DOCKET

DATE 1-7-99

PARTIES' JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Plaintiff, Plaintiff's attorneys, Defendant, and Defendant's attorneys stipulate and agree that Plaintiffs' cause of action against Defendant is dismissed without prejudice, with each party to bear its own costs and attorney fees.

By: Katherine T. Waller
KATHERINE T. WALLER OBA#15051
403 South Cheyenne
Suite 1200
Tulsa, Oklahoma 74103

Attorney for Plaintiff

-and-

By: Harry C. Parrish
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CJ

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of January, 1999 I deposited in the U.S. Mail a true and correct copy of the foregoing documents with proper postage thereon prepaid, addressed to:

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Katherine T. Waller

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

TEAM TIRES PLUS, LTD.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 98-CV-0449-K (E)**
	)	
TIRE PLUS, INC., d/b/a/ TIRE PLUS+,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

The Court has referred to the undersigned for Report and Recommendation Plaintiff's Motion for Partial Judgment on the Pleadings (Docket # 14) and Amended Motion for Partial Judgment on the Pleadings (Docket #30.) *See* 28 U.S.C. § 636. Plaintiff Team Tires Plus, Ltd. ("Team Tires") seeks judgment in its favor as to counts 1, 3, 6 and 7 of its Complaint, and as to the amended counterclaims of defendant Tire Plus, Inc. ("Tire Plus"). Team Tires' counts 1, 3, 6, and 7 set forth claims for federal trademark infringement, federal unfair competition, violation of the Oklahoma Deceptive Trade Practices Act, and federal false designation of origin. Tire Plus counterclaims for unfair competition, concurrent registration, cancellation of trademark, and disclaimer (all under federal law), as well as trademark infringement and unfair competition under common law, violations of the Oklahoma Deceptive Trade Practices Act, and cancellation of trademark under Oklahoma law. For the reasons set forth below, the undersigned recommends that Team Tires' motions be **DENIED**.

Introduction

Team Tires registered two of its service marks with the United States Patent and Trademark Office ("PTO") before Tire Plus began using service marks that Team Tires alleges are confusingly

similar. Team Tires also registered additional marks after Tire Plus began using the allegedly confusing marks. Tire Plus initially admitted that all of Team Tires' marks were confusingly similar to Tire Plus' marks, and Team Tires moved for partial judgment on the pleadings. In response, Tire Plus indicated that it did not intend to admit that all of Team Tire's marks are confusingly similar. Instead, Tire Plus intended to deny that the prior marks are confusingly similar but to admit, for purposes of its counterclaim, that two of Team Tires' marks registered after Tire Plus began using its marks are confusingly similar to one of its marks, its "word" mark. Tire Plus was permitted to amend its Answer and Counterclaim to make its distinction between the marks that it admits are confusingly similar, which it did, and Team Tires was permitted to amend its motion for partial judgment on the pleadings, which it did.

Team Tires asserts that the distinction Tire Plus seeks to make between the "before and after" marks is illogical and unsupportable for purposes of plaintiff's motions. Team Tires argues that there are even fewer points of difference between the marks that Tire Plus denies are confusingly similar than those it admits are confusingly similar.[1] Therefore, Team Tires contends, the Court must conclude that the earlier marks are confusingly similar and, since Team Tires registered its marks before Tire Plus began using its marks, plaintiff's motions should be granted.

Facts

The parties do not dispute certain facts. Team Tires and Tire Plus are engaged in the same type of business. Both sell tires and provide automotive services. Team Tires is headquartered in

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[1] Team Tires specifically asks the Court to compare the parties' word marks against the parties' design marks. In its response to Team Tires' amended motion, Tire Plus contends that its design mark is not confusingly similar to Team Tires' word mark, and it never intended to admit the same. (Docket # 36, at 3 n. 2.)

Minnesota, and it currently operates retail stores in several Midwestern states, but not yet in Oklahoma. Tire Plus operates one retail store in Tulsa, Oklahoma.

On May 10, 1983, Team Tires registered a composite mark with the words "Tires Plus" in stylized text, with the word "Tires" directly over the word "Plus" and the words "auto service center" underneath the "Tires Plus" stylized text. The parties refer to this mark as the "'623 mark" because of its registration number, No. 1,237,623. For purposes of clarity, the mark is referred to herein as the "1983 mark" even though Team Tires amended its registration in 1987 to delete the words "auto service center" from the mark. On May 19, 1987, Team Tires registered a composite mark that is exactly the same as the 1983 mark, but the stylized "stacked" text of "Tires Plus" is tilted to the left. The parties refer to this mark as the "'305 mark" because of its registration number, No. 1,440,305. The mark is referred to herein as the "1987 mark."

On June 5, 1992, Tire Plus filed an application in the PTO to register the mark "Tire Plus+" and it listed the date of it first use of the mark as March 18, 1992. The PTO refused registration because of the likelihood of confusion with Team Tires' 1987 mark. Tire Plus did not respond to the PTO's office action within the time allowed to avoid abandonment.

On May 30, 1995, Team Tires registered a word mark consisting of the words "Tires Plus" in plain block text. The parties refer to this mark as the "'430 mark" because of its registration number, No. 1,896,430. The mark is referred to herein as the "1995 mark." On September 3, 1997, Team Tires registered the word mark "Tires Plus" with the Oklahoma Secretary of State. The parties

refer to this mark as the "'923 mark" because of its registration number, No. 28923. The mark is referred to herein as the "1997 mark."[2]

Tire Plus admits that Team Tires' 1995 and 1997 marks are confusingly similar to its word mark, which consists of the words and symbol "Tire Plus+." Tire Plus does not admit that the 1995 and 1997 marks are confusingly similar to its design mark, which consists of stylized letters for the words "tire" and "plus" with the symbol "+" between the two words and a picture of a tire with the word "General" on the tire. As set forth above, Tire Plus expressly denies that its word mark is confusingly similar to Team Tires' 1983 and 1987 marks.

Analysis

The timing of Team Tires' registration and Tire Plus' use, as well as Tire Plus' admission or denial of confusing similarity, is crucial to a determination of whether Team Tires is entitled to partial judgment on the pleadings under the applicable law. If the two marks registered before Tire Plus' use are confusingly similar, Team Tires has superior rights in those marks throughout the United States and Tire Plus could continue to use its marks only until Team Tires expands into Tire Plus' territory. If the marks are not confusingly similar, the inquiry then becomes whether Tire Plus has valid affirmative defenses and counterclaims based upon its alleged common law ownership of the confusingly similar marks that Team Tires registered after Tire Plus' use.

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[2] On March 9, 1993, Team Tires registered a word mark consisting of the words "Tires Plus Heartland." The registration number is 1,757,155 and the parties refer to this mark as the "'155 mark." However, the parties do not argue that this mark is confusingly similar, and it is irrelevant for purposes of plaintiff's motions.

Standard of Review

A Rule 12(c) motion for judgment on the pleadings requires the court to view the facts presented in the pleadings as true and construe them in the light most favorable to the non-moving party. See Mock v. T.G.& Y. Stores Co., 971 F.2d 522, 528 (10th Cir. 1992). Although a Rule 12(c) motion may be treated as one for summary judgment under Fed.R.Civ.P. 56 if matters outside the pleadings are presented to and not excluded by the court, the undersigned does not recommend that the amended motion be converted to a Rule 56 motion because of the unique procedural posture of this case. Team Tires initially moved for partial judgment on the pleadings based upon its assumption that Tire Plus had admitted in the Answer and Counterclaim that all of Team Tires marks were confusingly similar to Tire Plus' marks. Tire Plus was permitted to amend its Answer and Counterclaim to distinguish which of Team Tires' marks it alleged were confusingly similar. The parties have not had adequate time for discovery nor have they been given reasonable opportunity to present all material made pertinent to a summary judgment motion. Further, consideration of matters outside the pleadings is unnecessary to a recommendation that Team Tires' is not entitled to partial judgment on the pleadings in this matter.

"A motion for judgment on the pleadings is not favored and will not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that [the moving party] is entitled to judgment as a matter of law. . . . Moreover, a trial on the merits would be more appropriate than a resolution of the case by a Rule 12 (c) motion if the pleadings do not resolve all of the factual issues in the case." Lambert v. Inryco, Inc., 569 F. Supp. 908, 912 (W.D. Okla. 1980) (citations omitted.) Material issues of fact remain to be resolved as to the likelihood of confusion

between the marks at issue and as to whether Tire Plus adopted its mark in good faith and in a remote area so that it may maintain its affirmative defenses or counterclaims.

Likelihood of Confusion

Under the statutory test for trademark infringement, Team Tires must prove that Tire Plus use of its mark is likely to cause confusion or mistake or to deceive purchasers as to the source or origin of its goods.

> Any person who shall, without the consent of the registrant -- (a) use in commerce any reproduction, counterfeit, copy or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; . . . shall be liable in a civil action by the registrant for the remedies hereinafter provided.

Lanham Act § 32(1)(a), 15 U.S.C. § 1114(1)(a). Team Tires must also prove a likelihood of confusion in order to succeed on its claim for unfair competition under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 769 (1992). Section 43(a) provides:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which -- (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . . shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act."

15 U.S.C. § 1125(a). "The test for violation of 15 U.S.C. § 1125 is essentially the same as that for service mark infringement." Service Merchandise v. Service Jewelry Stores, 737 F. Supp. 983, 997 (S.D. Tex. 1990). Finally, Team Tires must also show a likelihood of confusion to prove violation

of the Oklahoma Deceptive Trade Practices Act, 78 Okla. Stat. § 51 *et seq*. See Brunswick Corp. v. Spinit Reel Co., 832 F.2d 513, 527 (10th Cir. 1987).

In the Tenth Circuit, likelihood of confusion is a question of fact subject to the clearly erroneous rule of Fed. R. Civ. P. 52(a). This is the majority view. E.g., Heartsprings, Inc. v. Heartspring, Inc., 143 F.3d 550, 552 (10th Cir.), cert. denied 119 S.Ct. 408 (1998); Cardtoons, L.C. v. Major League Baseball Players Ass'n., 95 F.3d 959 (10th Cir. 1996); Coherent, Inc. v. Coherent Technologies, Inc., 935 F.2d 1122, 1125 (10th Cir. 1991); GTE Corp. v. Williams, 904 F.2d 536, 539 (10th Cir.), cert. denied, 498 U.S. 998 (1990); 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition (hereinafter "McCarthy") § 23:71 (4th ed. 1996). Nonetheless, Team Tires indicates that numerous courts, including the Tenth Circuit, have indicated a willingness to affirm a grant of summary judgment in appropriate cases where likelihood of confusion is at issue. See First Sav. Bank, F.S.B. v. First Bank System, Inc., 101 F.3d 645, 653 (10th Cir. 1996) (citing to Universal Money Centers, Inc. v. American Telephone & Telegraph Co., 22 F.3d 1527, 1529 n. 2 (10th Cir.), cert. denied, 513 U.S. 1052 (1994).[3] As set forth above, however, this case has not yet proceeded to the summary judgment stage. Team Tires also points out that judgment on the pleadings is available where the court finds that likelihood of confusion is inevitable from the facts alleged in the complaint and admitted in the answer. See Sable Communications Co. of Georgia v. Fulton, 40 U.S.P.Q. 2d 1370 (E.D. La. 1996). Here, likelihood of confusion is not the inevitable conclusion simply because Tire Plus admitted that one of Team Tires' marks is confusingly similar to its word mark.

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[3] Significantly, neither side in the First Savings case argued that the likelihood of confusion question was inappropriate for summary judgment. 101 F.3d at 656-57.

It would seem particularly inappropriate in this case, and at this stage of the proceedings, to grant a motion for partial judgment on the pleadings by comparing the 1983 and 1987 marks with Tire Plus' word mark, given the factors that must be considered in determining whether a likelihood of confusion exists. In the Tenth Circuit, a determination of whether there is a likelihood of confusion requires consideration of at least these factors: the degree of similarity between the designation and the trademark or trade name in (i) appearance, (ii) pronunciation of the words used, (iii) verbal translation of the pictures or designs involved, and (iv) suggestion; strength or weakness of the mark; the intent of the actor in adopting the designation; the relation in use and manner of marketing between the goods or services marketed by the actor and those marketed by the other; the degree of care likely to be exercised by the purchasers; and evidence of actual confusion. Heartsprings, Inc., 143 F.3d at 554 (citing Universal Money, 22 F.3d at 1530); see also First Savings, 101 F.3d at 652; Coherent, 935 F.2d at 1125 (citing Beer Nuts, Inc. v. Clover Club Foods Co., 805 F.2d 920, 925 (10th Cir. 1986); J. M.. Huber Corp v. Lowery Wellheads, Inc., 778 F.2d 1467, 1470 (10th Cir. 1985); and Jordache Enters., Inc. v. Hogg Wyld, Ltd., 828 F.2d 1482, 1484 (10th Cir. 1984)).[4]

Even though Team Tires' 1983 and 1987 marks may have become incontestable under 15 U.S.C. § 1065,[5] the burden of proving likelihood of confusion rests on the plaintiff. Universal Money, 22 F.3d at 1530 (citing Jordache, 828 F.2d at 1484); see also Coherent, 935 F.2d at 1125

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4 This is not meant to suggest that likelihood of confusion could not be appropriately determined on summary judgment, but only that such a determination is premature at this stage.

5 Marks are incontestable if it is shown that they have been continuously used for five consecutive years after registration.

("We conclude that a plaintiff with an incontestable mark must still show likelihood of confusion as an element of an infringement claim.") The standard is preponderance of the evidence. 3 McCarthy § 23:62. The test is not whether the decision-maker would find the marks confusingly similar, but whether an ordinary, prudent customer or purchaser would be confused. 3 McCarthy §§ 23:63, 23:90-94; see also Dawn Donut Co. v. Day, 450 F.2d 332 (10th Cir. 1971). This test inevitably calls for a subjective decision that is not appropriate for judgment on the pleadings.

Nonetheless, Team Tires asks the Court to consider that the PTO rejected Tire Plus' application to register its word mark in 1992. The PTO action was based on a likelihood of confusion between Tire Plus' mark and Team Tires' 1987 design mark. Tire Plus did not respond to the PTO action, and the action is therefore deemed abandoned under 15 U.S.C. § 1062(b). A decision by the PTO refusing to register applicant's mark is evidence of a likelihood of confusion in a subsequent infringement case. The PTO decision is not conclusive, but may be entitled to "great" or "substantial" weight, or at least "respectful consideration" in subsequent litigation. 3 McCarthy § 23:84. As Tire Plus points out, however, weighing of the evidence is inappropriate when a Court considers a motion for judgment on the pleadings.

Thus, even though Team Tire's 1983 and 1987 marks are "superior to any confusingly similar mark subsequently adopted anywhere in the United States," First Savings, 101 F.3d at 651, Team Tires must still prove likelihood of confusion. In the First Savings case, the court cautioned against comparison of the wrong marks: "First Bank System cannot make out its constructive notice defense by showing registration of the 1971 mark, but then a likelihood of confusion between a different mark . . . and First Savings' mark." Id., at 651 n. 8. Here, Team Tires cannot succeed on motion for partial judgment on the pleadings simply by showing registration of its 1983 and 1987

marks where Tire Plus has admitted likelihood of confusion with Team Tires' 1995 mark. "While registration creates various procedural advantages, it does not make it easier for the registrant to prove likelihood of confusion. 3 McCarthy § 23:76 (citing DeCosta v. Viacom Int'l, Inc., 981 F.2d 602 (1st Cir. 1992), cert. denied, 509 U.S. 923 (1993)). Although in close cases, any doubts as to the likelihood of confusion are resolved in favor of the senior user or prior registrant, see 3 McCarthy § 23:64, it does not follow that those doubts are appropriate for judicial determination on a motion for judgment on the pleadings.[6]

Common Law Ownership

In the amended motion, Team Tires no longer focuses on Tire Plus' alleged common law ownership of its marks, upon which Tire Plus bases its counterclaims and, in part, its affirmative defenses. Apparently, the parties recognize that Tire Plus' alleged common law ownership becomes relevant only if the Court finds that there is no likelihood of confusion between Tire Plus' marks and Team Tires' 1983 and 1987 marks. They also appear to recognize that Tire Plus' alleged common law ownership is not an appropriate issue for the motion for judgment on the pleadings. The issue deserves comment, however, given that Team Tires has moved for judgment on the pleadings as to Tire Plus' counterclaims.

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[6] Even if the Court were to determine that a likelihood of confusion exists between Team Tires' 1983 and 1987 marks and Tire Plus' word mark, "there is no likely confusion for a court to enjoin until the senior user shows a likelihood of entry into the junior user's trade territory." 4 McCarthy § 26:33; Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358 (2d Cir. 1959). Thus, the prior registrant has a right, but not a remedy, until the registrant proves its intent to enter the disputed territory. The "likelihood of entry" itself poses numerous factual issues, the resolution of which would appear an inappropriate basis upon which to grant a motion for judgment on the pleadings.

Tire Plus' alleged ownership of a word mark that it admits is confusingly similar to Team Tires' 1995 and 1997 marks is based upon the common-law *Tea Rose-Rectanus* doctrine. That doctrine is derived from two United States Supreme Court cases: Hanover Star Milling Co., v. Metcalf, 240 U.S. 403 (1916)(the "Tea Rose" case), and United Drug Co., v. Theodore Rectanus Co., 248 U.S. 90 (1918). The doctrine posits that, "absent appropriate federal legislation, the national senior user of a mark cannot oust a geographically remote good-faith user who has used the mark first in a remote trade area." GTE Corp. v. Williams, 904 F.2d 536, 541 (10th Cir.), cert. denied, 498 U.S. 998 (1990) (quoting 2 J. McCarthy, Trademarks and Unfair Competition § 26:1D (2d ed. 1984)). The senior user is the first to use a trademark within the United States. 4 McCarthy § 26:5. In this instance, it is not disputed that Team Tires is the senior user of the admitted confusingly similar mark, even though it did not register the mark until 1995 in the United States and 1997 in Oklahoma.

To prove the defense, the junior user must prove that its first use was in good faith, *i.e.*, without knowledge of the senior user's use, and in a remote area, *i.e.*, where the senior user's mark was unknown to customers. 4 McCarthy § 26:4. Tire Plus has not admitted that it knew of Team Tires' use of the mark, and it has not admitted that Team Tires' marks are known to customers in Oklahoma. Further, "[w]hile a subsequent user's adoption of a mark with knowledge of another's use can certainly support an inference of bad faith, . . . mere knowledge should not foreclose further inquiry. The ultimate focus is on whether the second user had the intent to benefit from the reputation or goodwill of the first user." GTE Corp, 904 F.2d at 541. Tire Plus' intent in adopting its mark is clearly a question of fact. Finding "remoteness" would also appear fact intensive. The

finder of fact must determine the territorial scope of a trademark, taking into consideration the user's sales, advertising, reputation and expansion. See 4 McCarthy § 26:27.

The *Tea Rose-Rectanus* doctrine has been effectively incorporated into the Lanham Act as an exception to the rule that a federal registrant of a trademark is entitled to exclusive use of the mark throughout the United States. 15 U.S.C. § 1115(a) provides that registration of a mark "shall not preclude an opposing party from proving any legal or equitable defense or defect which might have been asserted if such mark had not been registered." This section, together with 15 U.S.C. § 1057(b), establishes the prima facie evidentiary status of contestable registration. Team Tires' 1995 and 1997 marks are contestable because they have not been continuously used for five consecutive years after registration. See 15 U.S.C. § 1065. Thus, Team Tires' registration creates a *rebuttable* presumption of the validity of the registered mark, the registration of the mark itself, and the registrant's ownership of the mark. 5 McCarthy §§ 32:136, 32:138. See Educational Development Corp. v. Economy Co., 562 F.2d 26 (10th Cir. 1977). 15 U.S.C. § 1115(a) permits a *Tea Rose-Rectanus* challenge to the presumption.

The *Tea Rose-Rectanus* defense is also applicable where, as here, section 43(a) of the Lanham Act (15 U.S.C. 1125(a)) is the alleged basis of an alternative count, based upon false designation of origin, alleging trademark infringement of a registered mark. GTE Corp., 904 F.2d at 542. Similarly, Tire Plus' counterclaims for concurrent registration under 15 U.S.C. §1052(d), cancellation of trademark under 15 U.S.C. §1064, or disclaimer under 15 U.S.C. § 1056 are valid only to the extent that Tire Plus can prove common law ownership of the mark that it claims is confusingly similar to Team Tires' 1995 and 1997 marks.

Conclusion

The undersigned finds that the pleadings before the Court at this time are not sufficient to permit the Court to resolve the factual issues encompassed in a determination of the likelihood of confusion. Nor is the Court able to determine as a matter of law that Tire Plus failed to adopt its marks in good faith or in a remote area as required in order to establish common law ownership of its marks. Therefore, the undersigned recommends that Team Tire's Motion for Partial Judgment on the Pleadings (Docket # 14) and Amended Motion for Partial Judgment on the Pleadings (Docket # 30) be **DENIED**.

Objections

The District Judge assigned to this case will conduct a *de novo* review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of the *de novo* review, the District Judge will consider the parties' written objections to the Report and Recommendation. A party wishing to file objections must do so within ten days after being served with a copy of the Report and Recommendation. *See* 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). **The failure to file written objections may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court.** *See Thomas v. Arn*, 474 U.S. 140 (1985); *Ayala v. United States*, 980 F.2d 1342 (10th Cir. 1992).

Dated this 4th day of January, 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 6 Day of Jan, 1999.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STEVEN W. SOULE, Chapter 7 Trustee,	)	
	)	
Appellant,	)	
	)	
vs.	)	Case No.97-CV-1142-H(J)
	)	
DONALD L. WORLEY and PEOPLES NATIONAL BANK OF EL RENO,	)	
	)	ENTERED ON DOCKET
	)	
Appellee.	)	DATE 1/6/99

REPORT AND RECOMMENDATION

The Bankruptcy Court concluded that the Trustee could not avoid an $80,000 transfer. The Trustee appealed the decision of the Bankruptcy Court. For the reasons discussed below, the United States Magistrate Judge recommends that the decision of the Bankruptcy Court be **AFFIRMED.**

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Craig and Carolyn Coulter ("Debtors") filed a Petition under Chapter 11 of the United States Bankruptcy Code on September 7, 1994. On May 6, 1995, Coulter established a checking account at State Bank & Trust, N.A. ("State Bank") in the name of "Craig A. Coulter DBA TRIEXCO," Coulter transferred $10,000 from a different account that he maintained at State Bank to fund the TRIEXCO account. Coulter did not inform State Bank that he was a debtor-in-possession under Chapter 11. Coulter did not inform the Court, the office of the United States Trustee, or any creditors that he had opened the TRIEXCO account.

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In February or March of 1996 Coulter contacted Defendant Donald L. Worley ("Worley") informing him that he wanted to purchase Worley's interest in the Stone Bluff Waterflood Project, an oil and gas project in Wagoner County. According to Worley, TRIEXCO agreed to immediately pay $80,000 and take possession of the Project. Of the $80,000, $50,000 was paid to Worley personally and $30,000 to Peoples National Bank of El Reno ("Peoples Bank") in partial payment of Worley's indebtedness to Peoples. TRIEXCO was additionally, within 90 days, to pay the balance on Worley's debt and an additional outstanding Worley bill.

Coulter wrote two checks on the TRIEXCO account on March 6, 1996. Check number 1130 was payable to Worley in the amount of $50,000. Check number 1129 was payable to Peoples Bank in the amount of $30,000. The TRIEXCO account, on March 6, 1996, had a balance of $2,139.94. Coulter informed State Bank that he was expecting a wire transfer from Europe and requested that State Bank pay the two checks.

Worley deposited check number 1130 into Kingfisher Bank & Trust Co. on March 6, 1996, to an account belonging to his son to pay a debt he owed to his son. Kingfisher Bank presented that check, later that day, to the Federal Reserve Bank for payment. On March 8, 1996, State Bank received check number 1130 and debited the TRIEXCO account in the amount of $50,000. The TRIEXCO account indicated a negative balance of $47,890.06 on March 8, 1996. State Bank believed that the wire transfer promised by Coulter would cover the amounts and elected not to dishonor the check by the statutory midnight deadline of March 9, 1996.

On March 7, 1996, Peoples Bank presented check number 1129 to the Federal Reserve Bank for payment. On March 11, 1996, State Bank received check number 1129 and debited the TRIEXCO account for $30,000. The TRIEXCO account reflected a negative balance of $77,920.06 on March 11, 1996. State Bank elected not to dishonor check number 1129 by the statutory midnight deadline of March 12, 1996.

The promised wire transfer did not occur, and on March 15, 1996, State Bank advised Peoples Bank and Kingfisher Bank by phone of State Bank's intent to dishonor the checks. State Bank returned the two checks to Peoples Bank and Kingfisher Bank. On March 15, 1996, State Bank also reversed the debits and credited the TRIEXCO account for $80,000. When Peoples Bank and Kingfisher Bank received the two checks, each bank filed a "Bank Claim of Late Return" with the Federal Reserve Bank claiming that State Bank failed to timely dishonor the checks.

State Bank did not dispute Peoples Bank's and Kingfisher Bank's claims of late return. On March 21, 1996, the Federal Reserve Bank returned the two TRIEXCO checks to State bank and debited State Bank's account at the Federal Reserve Bank for $80,000. On March 26, 1996, State Bank debited the TRIEXCO account in the amount of $80,000.

State Bank commenced an adversary proceeding against Coulter, Worley and Peoples Bank to recover the $80,000 on July 26, 1996. On September 5, 1996, the Chapter 11 case was converted to a Chapter 7 case based on a motion by State Bank. The Chapter 7 Trustee was appointed September 13, 1996, and was added as an additional plaintiff in the adversary proceeding. On December 18, 1996, the Trustee

filed the Trustee's Amended Complaint, and State Bank filed an Amended Complaint of State Bank for exception to discharge. The Trustee asserted an action against Worley and Peoples Bank for avoidance of post-petition transfers.

The Trustee asserted that the $80,000 transfer should be avoided based on the principles of (1) fraudulent transfer, (2) unauthorized post-petition transfer, and (3) unjust enrichment. The Bankruptcy Court concluded that although a transfer of property had occurred, because the Federal Reserve Board debited the account of State Bank, the transfer did not constitute "property of the estate" and therefore the transfer could not be avoided by the Trustee. Because the transfer of property was not property of the estate, the Bankruptcy Court additionally concluded that the Trustee could not avoid it as a fraudulent transfer. The Bankruptcy Court noted that the Trustee could not establish the requisites of unjust enrichment.

II. STANDARD OF REVIEW

The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. Conclusions of law are reviewed *de novo*. Bartmann v. Maverick Tube Corp., 853 F.2d 1540, 1543 (10th Cir. 1988). "When reviewing factual findings, an appellate court is not to weigh the evidence or reverse the finding because it would have decided the case differently. A trial court's findings may not be reversed if its perception of the evidence is logical or reasonable in light of the record." In re Branding Iron Motel, Inc., 798 F.2d 396 (10th Cir. 1986) (citations omitted).

III. ANALYSIS

TRANSFER OF PROPERTY OF THE ESTATE

Appellant asserts that "transfer" is defined broadly under the Bankruptcy Code. Appellant refers to 11 U.S.C. § 101(54) which defines transfer as

> [E]very mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption.

The Bankruptcy Court agreed with Appellant that transfer is defined broadly and the Court concluded that three transfers of property occurred.

> This analysis reveals at least three separate transfers of property in connection with the payment of the Two Checks.
> * * * *
> Because "transfer" is broadly defined in Section 101(54) of the Bankruptcy Code to include involuntary dispositions of property, the debits made by State Bank to Coulter's Account on March 6, 1996, and March 11, 1996, which collectively constituted the First Transfer of Property, were transfers of property of Coulter's Chapter 11 estate. The First Transfer of Property, however, was reversed, and the property was transferred back to Coulter's account.
>
> The Second Transfer of Property occurred when the Federal Reserve Bank debited State Bank's account in the amount of $80,000.00. State Bank was independently obligated to pay $80,000.00 in damages as a result of its failure to timely dishonor the Two Checks. Because the $80,000.00 that was ultimately paid to Worley and Peoples Bank was property of State Bank and not property of the Debtors' estate, the Trustee's cause of action against Worley and Peoples Bank to avoid unauthorized post-petition transfers from the Debtors' estate must be denied.

See Bankruptcy Court's Order at 8-9 (footnote omitted).

Appellant initially asserts that the holding of the Bankruptcy Court is contrary to the decision of the Supreme Court in Barnhill v. Johnson, 503 U.S. 393 (1992). Barnhill addresses when a transfer occurs and concluded that by honoring the check, a transfer occurred. The Court does not view Barnhill as contrary to the conclusions reached by the Bankruptcy Court. The Bankruptcy Court concluded, in accordance with the broad definition of "transfer" under the Bankruptcy Code, that a transfer occurred when the two checks (one in the amount of $30,000, and one in the amount of $50,000) were paid by State Bank and the amounts debited to Coulter's account. An additional transfer occurred when State Bank credited Coulter's account and decided to "dishonor" the two checks. The Bankruptcy Court found a "second" transfer when the Federal Reserve Bank debited State Bank's account in the amount of $80,000 ($30,000 for damages to Peoples Bank and $50,000 for damages to Kingfisher Bank). State Bank then charged these amounts to Coulter's account. The Bankruptcy Court concluded that the third transfer did not constitute "property of the estate." The Court does not view this holding as inconsistent with Barnhill.

Appellant similarly refers to Hansen, Trustee of the Kemp Pacific Fisheries, Inc. v. MacDonald Meat Co., 16 F.3d 313 (9th Cir. 1994). The Ninth Circuit affirmed a Bankruptcy Court's avoidance of a check which resulted in an overdrawn account of $70,000. This Court concludes that Hansen is not contrary to the decision of the Bankruptcy Court. The Bankruptcy Court concluded that the "first transfer" included property of the estate. This transfer is analogous to the transfer in Hansen. However, in this case, unlike Hansen, State Bank transferred the funds back to the debtor. State

Bank failed to dishonor the checks prior to the midnight deadline, and Peoples Bank and Kingfisher Bank filed a "Bank Claim of Late Return." State Bank became independently liable for the amounts owed to Peoples Bank and Kingfisher Bank. Therefore, the Bankruptcy Court concluded that the debit by the Federal Reserve Bank of State Bank's account for $30,000 to Peoples Bank and $50,000 to Kingfisher Bank constituted a transfer of property of State Bank but did not constitute "property of the estate." This is not contrary to Hansen.

Appellant cites several cases which hold that the payment of a check by a bank to a third party when the account upon which the check is drawn reflects a negative deposit is a transfer of "property of the debtor." These cases are also not contrary to the decision of the Bankruptcy Court. The Bankruptcy Court concluded that the first transfer was a transfer of property of the estate. However, the Bankruptcy Court additionally concluded that State Bank transferred the property back to the debtor when it credited the debtor's account with $80,000 and gave notice of intent to dishonor the checks. The Bankruptcy Court found that the final transfer was by the Federal Reserve Board. This transfer was against the wishes of State Bank and was made because State Bank did not dishonor the checks prior to the midnight deadline. The Bankruptcy Court concluded this rendered State Bank independently liable for the amounts due Peoples Bank and Kingfisher Bank, and that the funds transferred were not property of the estate. These conclusions are not contrary to the cases cited by Appellant.

The Magistrate Judge recommends that the District Court affirm the decision of the Bankruptcy Court that the transfer was not "property of the estate," and could therefore not be avoided by the Trustee.

FRAUDULENT TRANSFER

The Bankruptcy Court concluded that because the final transfer of the $80,000 was property of State Bank rather than Coulter, it could not be avoided as a fraudulent transfer. Appellant does not further develop this argument on appeal.

UNJUST ENRICHMENT

Appellant asserts that the Bankruptcy Court erred by concluding that the transfer could not be avoided under principles of unjust enrichment. The Bankruptcy Court concluded that, under Oklahoma law, a bank that fails to give notice of dishonor prior to expiration of a midnight deadline has a separate and independent obligation to pay the amounts due. The Bankruptcy Court concluded that State Bank was statutorily obligated to pay the two checks, and that this requirement could not be altered by the principles of unjust enrichment. The Magistrate Judge recommends that the District Court affirm the decision of the Bankruptcy Court.

OBJECTIONS

The District Judge assigned to this case will conduct a de novo review of the record and determine whether to adopt or revise this Report and Recommendation or whether to recommit the matter to the undersigned. As part of his/her review of the record, the District Judge will consider the parties' written objections to this Report

and Recommendation. A party wishing to file objections to this Report and Recommendation must do so within ten days after being served with a copy of this Report and Recommendation. See 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). The failure to file written objections to this Report and Recommendation may bar the party failing to object from appealing any of the factual or legal findings in this Report and Recommendation that are accepted or adopted by the District Court. See Moore v. United States, 950 F.2d 656 (10th Cir. 1991); and Talley v. Hesse, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

Dated this 5 day of January 1999.

Sam A. Joyner
United States Magistrate Judge

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 12 Day of January, 1999.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEBRA BELL, **SSN: 440-68-9996,** **Plaintiff,** **v.** **KENNETH S. APFEL, Commissioner, Social Security Administration,** **Defendant.**	)	ENTERED ON DOCKET DATE JAN 06 1999 **Case No. 97-CV-0426-EA** **FILED** JAN - 5 1999 Phil Lombardi, Clerk U.S. DISTRICT COURT

JUDGMENT

This action has come before the Court for consideration and an Order affirming the Commissioner's denial of benefits to Plaintiff has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 5th day of January 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DEBRA BELL,
SSN: 440-68-9996,

Plaintiff,

v.

KENNETH S. APFEL, Commissioner, Social Security Administration,[1]

Defendant.

Case No. 97-CV-0426-EA

ORDER

Claimant, Debra Bell, pursuant to 42 U.S.C. § 405(g), requests judicial review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying claimant's application for disability benefits under the Social Security Act.[2] In accordance with 28 U.S.C. § 636(c)(1) and (3), the parties have consented to proceed before a United States Magistrate Judge. Any appeal of this order will be directly to the Tenth Circuit Court of Appeals.

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1 Effective September 29, 1997, pursuant to Fed. R. Civ. P. 25(d)(1), Kenneth S. Apfel is substituted for John J. Callahan, Commissioner of Social Security, as the Defendant in this action. No further action need to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

2 On June 23, 1994, claimant protectively filed for disability benefits under Title II (42 U.S.C. § 401 et seq.), and for Supplemental Security Income benefits under Title XVI (42 U.S.C. § 1381 et seq.). Claimant's application for benefits was denied in its entirety initially (December 1, 1994), and on reconsideration (February 2, 1995). A hearing before Administrative Law Judge Richard J. Kallsnick (ALJ) was held January 30, 1996, in Tulsa, Oklahoma. By decision dated April 11, 1996, the ALJ found that claimant was not disabled at any time through the date of the decision. On February 28, 1997, the Appeals Council denied review of the ALJ's findings. Thus, the decision of the ALJ represents the Commissioner's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Claimant appeals the decision of the ALJ and asserts that the Commissioner erred because the ALJ incorrectly determined that claimant was not disabled. For the reasons discussed below, the Court **AFFIRMS** the Commissioner's decision.

I. CLAIMANT'S BACKGROUND

Claimant was born March 25, 1959, and was 36 years old at the time of her administrative hearing. She has a 12th grade education and attended a vocational school for training as a nurse's assistant. Claimant suffers from insulin-dependent diabetes mellitus. Claimant alleges that she became unable to work on April 13, 1993[3] due to pain in her arms, hands, feet, and legs, headaches, and drowsiness, dizziness, and fatigue caused by her medications. Her past work includes day care worker, waitress, assembly worker, and maid.

II. SOCIAL SECURITY LAW AND STANDARDS OF REVIEW

Disability under the Social Security Act is defined as the "...inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment...." 42 U.S.C. § 423(d)(1)(A). A claimant is disabled under the Social Security Act only if her "physical or mental impairment or impairments are of such severity that [she] is not only unable to do [her] previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work in the national economy...." Id., § 423(d)(2)(A). Social

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[3] Claimant filed prior Title II and Title XVI applications which were denied initially on August 18, 1993, and not pursued. Although claimant alleges an onset date of April 13, 1993, the prior determination of August 18, 1993 is binding under the doctrine of res judicata. For Title II purposes, the relevant period is August 19, 1993 (date following last determination) to December 31, 1994 (date claimant was last insured). For Title XVI, the relevant period is August 19, 1993 to April 11, 1996 (date of the ALJ's opinion).

Security regulations implement a five-step sequential process to evaluate a disability claim. See 20 C.F.R. § 404.1520.[4]

Judicial review of the Commissioner's determination is limited in scope by 42 U.S.C. § 405(g). This Court's review is limited to two inquiries: first, whether the decision was supported by substantial evidence; and, second, whether the correct legal standards were applied. Hargis v. Sullivan, 945 F.2d 1482, 1486 (10th Cir. 1991).

One of the issues now before the Court is whether there is substantial evidence in the record to support the final decision of the Commissioner that claimant was not disabled within the meaning of the Social Security Act. The term substantial evidence has been interpreted by the U.S. Supreme Court to require "...more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). The search for adequate evidence does not allow the court to substitute its discretion for that of the agency. Cagle v. Califano, 638 F.2d 219 (10th Cir. 1981). Nevertheless, the court must review the record as a whole,

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[4] Step One requires claimant to establish that she is not engaged in substantial gainful activity, as defined by 20 C.F.R. § 404.1510. Step Two requires that claimant establish that she has a medically severe impairment or combination of impairments that significantly limit her ability to do basic work activities. See 20 C.F.R. § 404.1521. If claimant is engaged in substantial gainful activity (Step One) or if claimant's impairment is not medically severe (Step Two), disability benefits are denied. At Step Three, claimant's impairment is compared with certain impairments listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1. A claimant suffering from a listed impairment, or impairments "medically equivalent" to a listed impairment, is determined to be disabled without further inquiry. If not, the evaluation proceeds to Step Four, where the claimant must establish that she does not retain the residual functional capacity (RFC) to perform her past relevant work. If claimant's Step Four burden is met, the burden shifts to the Commissioner to establish at Step Five that work exists in significant numbers in the national economy which the claimant--taking into account her age, education, work experience, and RFC--can perform. See Diaz v. Secretary of Health & Human Servs., 898 F.2d 774 (10th Cir. 1990). Disability benefits are denied if the Commissioner shows that the impairment which precluded the performance of past relevant work does not preclude alternative work.

and "the substantiality of the evidence must take into account whatever in the record fairly detracts from its weight." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

III. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The ALJ made his decision at the fifth step of the sequential evaluation process. He found that claimant had the residual functional capacity (RFC) for light work which would allow changing positions from time to time. The ALJ determined that claimant has no past relevant work because she had not worked sufficiently long enough or earned enough in the past 15 years. The ALJ concluded that there were other jobs existing in significant numbers in the national and regional economies that claimant could perform, based on her RFC, age, education, and work experience. Having concluded that there were a significant number of jobs which claimant could perform, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

IV. REVIEW

Claimant asserts as error that the ALJ's RFC and credibility findings are not supported by substantial evidence, and that the ALJ relied on an improper hypothetical question to the vocational expert (VE).

A. RFC Finding

The ALJ found that claimant retained the RFC to perform light work which would allow changing positions from time to time. Claimant asserts that this finding is not based on substantial evidence.

Claimant has insulin-dependent diabetes mellitus with peripheral neuropathy in both upper and lower extremities. (R. 19, 256, 262) In support of her assertion that the RFC for light work is not

supported by substantial evidence, claimant relies primarily on a January 31, 1996 "RFC assessment" by one of claimant's treating physicians, William Yarborough, M.D., that is assumed to pertain to claimant, although there is no name or social security number on the form. (R. 279-81)

The record reflects that Dr. Yarborough treated claimant from October 26, 1994 through January 17, 1996. (R. 248-53, 260-63, 282-92) Dr. Yarborough saw claimant on the following dates: 10/26/94, 11/14/94 (R. 248-53); 2/13/95 (R. 260-63); 8/9/95, and 1/17/96 (R. 282-92). She was diagnosed with, and treated for, diabetes mellitus, diabetic neuropathy, and arthralgia. (Id.) She was also treated in 1995-96 for depression related to her illness and the illness and death of her grandmother. (R. 263, 276, 284) On June 22, 1995, another doctor at the Adult Medicine Clinic of the University of Oklahoma Tulsa Medical Center ("OU Clinic"), where Dr. Yarborough treated claimant, signed off on the following evaluation of claimant: zero gait deficit, palpable pedal pulses, vibratory sensation intact right foot, vibratory sensation intact above ankle left foot, temperature sensation intact bilaterally but diminished left foot; diagnoses: diabetic neuropathy and diabetes mellitus. (R. 262)

Claimant's administrative hearing was held January 30, 1996, and claimant testified that no doctors had placed any restrictions on any of her activities. (R. 56) The ALJ held the record open for 15 days so that additional medical records of treatment claimant had received could be submitted. (R. 37, 58, 69)

The day after the hearing, Dr. Yarborough completed the form in question on which he indicated several restrictions of work-related activities. (R. 279-81) However, there is no indication that any clinical or diagnostic tests were performed to support these limitations. (Id.) Dr. Yarborough fails to state upon what medical evidence he based his findings, and fails to indicate that

he examined the claimant. Dr. Yarborough states that claimant's balance was compromised from neuropathy (R. 280), but the record is void of any evidence of claimant falling, losing her balance, or requiring assistance devices to ambulate safely.

Substantial weight must be given to the opinion of a treating physician unless good cause is shown for rejecting it. 20 C.F.R. §§ 404.1527, 416.927; Reyes v. Bowen, 845 F.2d 242, 244-45 (10th Cir. 1988). A treating physician's report may be rejected if it is brief, conclusory, and unsupported by medical evidence. Bernal v. Bowen, 851 F.2d 297 (10th Cir. 1988). If the treating physician's opinion is to be disregarded, specific, legitimate reasons for doing so must be set forth. Byron v. Heckler, 742 F.2d 1232, 1235 (10th Cir. 1984).

The ALJ acknowledged that Dr. Yarborough was a treating physician and discussed in detail the purported "RFC assessment." (R. 24-25) The ALJ determined it could not be given controlling weight. The RFC assessment in question is brief, conclusory, and unsupported by medical evidence. In deciding not to give the assessment controlling weight, the ALJ gave specific, legitimate reasons for doing so, including: failure to support the alleged limitations with medically acceptable clinical and diagnostic techniques, inconsistency with other substantial evidence, the conclusory nature of the opinions, and failure of the record as a whole to support the extent of the restrictions noted. (Id.) Thus, the ALJ's analysis is not contrary to law.

The analysis is also supported by substantial evidence, to which the ALJ cites to support his RFC determination. Most notably, to support the finding of RFC for light work, the ALJ cited to the consultative examination of E. Joseph Sutton, D.O. (R. 20), who was claimant's treating physician from 1991 to January 1994. On November 17, 1994, Dr. Sutton performed a physical examination which revealed normal range of motion with good grip strength bilaterally, normal fine motor

coordination, bounding bilateral dorsalis pedis pulses, no evidence of edema, and normal gait in terms of speed, stability, and safety, without need of any assistance device. Reflexes in claimant's lower extremities were absent, her biceps and triceps reflexes were 2+ bilaterally, and straight-leg raises in the sitting position were normal. Dr. Sutton's overall impression was diabetes mellitus, insulin dependent; diabetic neuropathy; chronic obstructive pulmonary disease secondary to cigarette use; and some degree of depression. (R. 20, 254-58) Dr. Sutton's analysis is consistent with the June 1995 OU Clinic evaluation, and with the medical record as a whole (R. 189-204, 214-16, 233-38, 239-47, 248-53, 260-63, 282-92). Substantial evidence supports the RFC for light work, subject to changing positions.

Claimant also asserts that the ALJ failed to properly consider her mental impairments in arriving at the RFC. Specifically, claimant points to a July 1995 Global Assessment of Functioning (GAF) of 50 (R. 277), and argues that a GAF of 50 involves being unable to keep a job.

In his RFC determination, the ALJ considered claimant's mental condition, including her diagnosis of depression and insomnia, for which she was prescribed medication. (R. 21-22) The ALJ stated that he reviewed all the evidence, including the medical records from her July 1995 visit to Parkside, Inc. for depression and insomnia, where the GAF of 50 was noted. (R. 22, 275-78) The ALJ completed a Psychiatric Review Technique (PRT) form and attached it to his decision. (R. 22 29-31) The ALJ found that:

> claimant's depression has resulted in a slight restriction of activities of daily living and slight difficulties in maintaining social functioning. The claimant has seldom experienced deficiencies of concentration, and has never experienced episodes of

> deterioration or decompensation. The Administrative Law Judge further finds that the claimant's depression is mild and situational, and would have no effect on her ability to perform work-related activity.

(R. 22)

The GAF upon which claimant relies was considered by the ALJ, because it was part of the records he said he considered. (Id.) There is no requirement that the ALJ discuss every piece of evidence in the record. Clifton v. Chater, 79 F.3d 1007, 1009-10 (10th Cir. 1996). What claimant is arguing in essence is that the ALJ should have given the GAF controlling weight. The "assessment" was made by a non-physician on an intake form for a clinic visit that lasted one hour. (R. 277) The GAF does not have to be given controlling weight because it was not provided by a physician. Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). Further, the Parkside medical records do not conflict with the PRT form completed by the ALJ, wherein he noted that claimant suffers from depressive disorder. (Compare R. 29-31 with R. 275-78) The ALJ concluded that claimant's depression was mild and situational (partially related to the 1995 death of her grandmother who raised her), and would have no effect on her ability to perform work-related activity. (R. 22)

Overall, the ALJ's RFC finding is supported by substantial evidence and is not contrary to law.

B. Credibility Finding

Claimant asserts that the ALJ finding that her testimony regarding her impairments was only partially credible is contrary to law. Claimant argues that she met the factors set forth in Luna v. Bowen, 834 F.2d 161 (10th Cir. 1987), and that the ALJ did not comply with the requirements of Kepler v. Chater, 68 F.3d 387 (10th Cir. 1995).

With regard to the Luna analysis, claimant submits that she sought relief for her symptoms, attempted prescribed treatments, and had regular contact with her physicians. In this regard, the ALJ recounted in detail claimant's testimony, including her allegation of totally disabling pain. The ALJ compared this allegation and claimant's testimony to her prior statements and the other evidence, and concluded that claimant's pain is limiting, but not severe enough to preclude all types of work. (R. 21-22) The ALJ specifically referenced Luna, and analyzed the relevant factors to determine the weight to be given claimant's subjective allegations of pain, including attempts to find relief, willingness to try prescribed treatment, contacts with doctors, mental impairment (depression and insomnia), daily activities, and medications and their side effects. (Id.) It cannot be said that the ALJ did not consider the Luna factors, only that claimant disagrees with his conclusion. However, as required by Kepler, the ALJ made express findings as to the credibility of claimant's objective complaints of disabling pain, with an explanation of why specific evidence relevant to each factor led to the conclusion that claimant's subjective complaints were not fully credible. (R. 22-23; see Kepler, 68 F.3d at 391) The ALJ cited to specific evidence of claimant's noncompliance with her medication and sporadic follow-up visits to her doctor. (R. 22, 190, 224, 254) Failure to follow prescribed treatment is a legitimate consideration in evaluating the severity of an alleged impairment. Decker v. Chater, 86 F.3d 953, 955 (10th Cir. 1996). Although claimant's lack of follow-up may have been partially related to finances (R. 254), the ALJ noted that claimant provided no evidence that she had sought and been denied medical treatment from treating sources or from indigent care facilities. (R. 23)

An ALJ's credibility determination evaluating non-exertional impairments such as pain will not be disturbed when supported by substantial evidence. Diaz v. Secretary of Health and Human

Servs., 898 F.2d 774 (10th Cir. 1990). Here, the ALJ's credibility finding was supported by other objective evidence, including Dr. Sutton's evaluation (R. 254-58), the OU Clinic evaluation (R. 262), and claimant's testimony that no doctor had placed any restriction on any of her activities (R. 56).

Given the ALJ's unique position to observe claimant and the fact that the credibility finding is supported by substantial evidence, this Court will not disturb the ALJ's finding.

C. Hypothetical Question

The claimant asserts that the ALJ failed to include her pain and all of her physical limitations in his hypothetical question to the VE. There is no merit to this claim. It is true that "testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision." Hargis v. Sullivan, 945 F.2d 1482, 1492 (10th Cir. 1991) (quoting Ekeland v. Bowen, 899 F.2d 719, 722 (8th Cir. 1990)). However, in forming a hypothetical to a VE, the ALJ need only include impairments if the record contains substantial evidence to support their inclusion. Evans v. Chater, 55 F.3d 530, 532 (10th Cir. 1995); Talley v. Sullivan, 908 F.2d 585, 588 (10th Cir. 1990).

Initially the ALJ established that the VE had studied claimant's record and heard her testimony. (R. 60) The ALJ's hypothetical question assumed that claimant could do light and sedentary work which would allow claimant to change positions, and assumed that claimant had mild to moderate chronic pain which would be of sufficient severity so as to be noticeable to her at all times. (R. 62-63) It was only when the VE was asked to assume impairments that the ALJ properly deemed unsubstantiated that the VE found claimant could not work. (R. 65) This opinion, based on unsubstantiated assumptions, was not binding on the ALJ. Gay v. Sullivan, 986 F.2d 1336, 1341 (10th Cir. 1993).

Finally, claimant asserts that the VE gave an erroneous answer to the ALJ as to whether the jobs of taxi starter and telephone sales were unskilled or semi-skilled. (R. 65) If a mistake is immaterial, it is harmless error. Curry v. Sullivan, 925 F.2d 1127, 1131 (9th Cir. 1990). Actually, the VE did not make a mistake; he explained that he believed that claimant, with her high school education, could perform these jobs even though she had no transferrable skills. (R. 67-68) In any event, the issue is academic because the ALJ did not rely on the taxi starter job in his Step Five determination (R. 26, 27), and even if the telephone sales job numbers were deleted from the VE testimony, there were significant jobs in the regional and national economies that claimant could perform despite her impairments.

V. CONCLUSION

The decision of the Commissioner is supported by substantial evidence and the correct legal standards were applied. The decision is **AFFIRMED**.

DATED this 5th day of January, 1999.

Claire V Eagan

CLAIRE V. EAGAN
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SPIRITBANK, N.A., a National Association Bank, Plaintiff, v. THE CENTRAL OKLAHOMA HOUSING DEVELOPMENT AUTHORITY, an Oklahoma Public Trust, ORLIE BOEHLER, an individual, RON FRAZE, an individual, and EASTERN DEVELOPMENT, INC., a Texas corporation, Defendants.	Case No. 98 CV 440 K (E)

FILED
JAN 05 1999
Phil Lombardi, Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE 1/6/99

DISMISSAL WITH PREJUDICE

Plaintiff SpiritBank, N.A. and Defendants Ron Fraze and Eastern Development No. 1, Inc., pursuant to Federal Rule of Civil Procedure 41, hereby stipulate and agree to the dismissal with prejudice of said cause, all issues between them having now been compromised, settled, satisfied, and released. The parties agree that the Court shall retain jurisdiction to resolve any future disputes which may arise in connection with the settlement agreement executed by the parties. Each party shall bear its own costs, expenses, and attorney fees. This dismissal specifically excludes Orlie Boehler.

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Eastern Development No. 1, Inc.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing document was mailed, postage prepaid, this 5 day of ~~December~~, 1998, to:

Gregory G. Meier
Meier, Cole & O'Dell
1524 South Denver Avenue
Tulsa, OK 74119-3829

Kenneth E. Wagner

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM H. WANLESS, JR.,

Petitioner,

vs.

STEPHEN KAISER, Warden,

Respondent.

No. 98-CV-976-B (J)

ORDER OF TRANSFER

Petitioner, a state prisoner appearing pro se, has submitted for filing an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, a motion for leave to proceed in forma pauperis, and a motion for appointment of counsel.

A prisoner in custody pursuant to the judgment and sentence of a State court which has two or more Federal judicial districts may file a petition for writ of habeas corpus in either the district court for the district wherein such person is in custody or in the district court for the district within which the conviction was entered. 28 U.S.C. § 2241(d). Each of such district courts shall have concurrent jurisdiction over the petition and the district court wherein the petition is filed may, in the exercise of its discretion and in furtherance of justice, transfer the petition to the other district court for hearing and determination. Id.

In the instant case, Petitioner was convicted in Stillwater, Payne County, Oklahoma. Payne County is located within the jurisdictional territory of the United States District Court for the Western District of Oklahoma. 28 U.S.C. § 116(c). Petitioner is currently incarcerated at a state correctional facility in Hughes County, Oklahoma. Hughes County is located within the

jurisdictional territory of the United States District Court for the Eastern District of Oklahoma. 28 U.S.C. § 116(b). Pursuant to 28 U.S.C. § 2241(d), this Court may not properly consider this petition. Because Petitioner challenges his conviction entered by the Payne County District Court, the most convenient forum for judicial review of the issues raised in this petition would be the Western District of Oklahoma where any necessary records and witnesses would most likely be available. Therefore, this Court concludes that, in the furtherance of justice, this matter should be transferred to the United States District Court for the Western District of Oklahoma.

ACCORDINGLY, IT IS HEREBY ORDERED that this matter is **transferred** to the United States District Court for the Western District of Oklahoma for all further proceedings. See 28 U.S.C. § 2241(d).

SO ORDERED THIS 31st day of Dec, 199__.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOLORES J. LEE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Court No: 97-C-923-BU (E)**
	)	
NORTHEAST OKLAHOMA ELECTRIC COOPERATIVE, INC., an Oklahoma corporation,	)	
	)	
Defendant.	)	

STIPULATION OF DISMISSAL WITH PREJUDICE

The Plaintiff, Dolores J. Lee, pursuant to Fed.R.Civ.P. 41, by and through her attorneys, the law firm of Feldman, Franden, Woodard & Farris, dismisses her petition in the above-styled and numbered case with prejudice for the reason that same has been fully compromised and settled. Defendant agrees to such dismissal.

DATED this 4 day of January, 1999.

FELDMAN, FRANDEN, WOODARD & FARRIS

By _____
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ATTORNEYS FOR PLAINTIFF

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ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KAWASAKI VILLAGE, INC., d/b/a DICK LANE'S OF GRAND LAKE,

Plaintiff,

v.

KAWASAKI MOTORS CORP., U.S.A. and TOD HAMMOCK,

Defendants.

Case No. 98-C-581-K

ORDER

Now before the Court is the objection of the defendants Kawasaki Motors Corp., U.S.A. and Tod Hammock to the Report and Recommendation of the United States Magistrate Judge. By Order filed September 8, 1998, the Court referred to the Magistrate Judge the motions of the defendants to dismiss and the objection of the plaintiff to removal, construed as a motion to remand. The Magistrate Judge held an evidentiary hearing and, finding the motion to remand dispositive, only addressed that motion. The Report and Recommendation recommends that this action be remanded to state court.

Removal and remand issues regarding jurisdictional amount are governed by the Tenth Circuit decision in Laughlin v. Kmart Corp., 50 F.3d 871 (10th Cir.), cert. denied, 516 U.S. 863 (1995). In Laughlin, the court summarized applicable principles:

> The amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. The burden is on the party requesting removal to set forth, in the notice of removal itself, the "underlying facts supporting [the] assertion that the amount in controversy exceeds $50,000." Moreover, there is a presumption against removal jurisdiction.

50 F.3d at 873 (citations omitted).

After Laughlin was decided, Congress has since raised the requisite jurisdictional amount to $75,000. It is quite common for a state court petition in Oklahoma to merely seek damages "in excess of $10,000", as this is in compliance with 12 O.S. §2008(A)(2)[1]. Thus, the dilemma posed by Oklahoma cases is that a claim for damages "in excess of $10,000", considered in isolation, will never be dispositive of jurisdictional amount.

In the case at bar, plaintiff filed his petition in state court under the heading "Petition for Breach of Agreement". Plaintiff alleged that he and defendant Kawasaki Motors Corp., U.S.A. ("Kawasaki") had entered into a written agreement in 1994 whereby plaintiff would serve as an authorized Kawasaki dealer for "jet skis" in the Grand Lake area. The petition further alleged that Kawasaki's "agent", co-defendant Tod Hammock, made representations to plaintiff that Kawasaki would expand plaintiff's franchise to include sales of motorcycles, ATVs (all-terrain

[1]Defendants argue that the state court petition is not in compliance with §2008(A)(2) because a plaintiff is required to plead a specific dollar amount in a contract action. The Court agrees with the Magistrate Judge that such pleading is not required, especially when the damages are not liquidated, as in this case.

vehicles) and other landcraft manufactured by Kawasaki.

The petition states that in reliance upon Hammock's representations, Hammock relocated and built a new business facility. In addition, plaintiff allegedly incurred expenses for advertising, dealer shows, and promotion of Kawasaki products. Plaintiff was terminated as a Kawasaki dealer in February, 1998. Plaintiff sues based upon the subsequent oral agreement allegedly formed between Kawasaki, through its agent, and plaintiff.

Defendants timely filed a notice of removal. In that document, they assert that Hammock, an Oklahoma resident, has been improperly joined in the action and should be dismissed to create complete diversity. Further, "[i]t is undisputed that [plaintiff] made capital expenditures in excess of $75,000 with respect to the business facility it alleges to have designed and built in the Grand Lake area as a result of its alleged reliance upon representations by Kawasaki Motors." Defendants also note the damage claim regarding "other expenses" appearing in the state court petition.

At the hearing, the Magistrate Judge took evidence which indicated that the newly constructed retail facility by plaintiff was built at a cost of at least $352,530.00 and a warehouse facility was built at a cost of at least $63,915.00. (Report and Recommendation at 4). Plaintiff, through its owner Mr. Lane, testified at the hearing that plaintiff did not seek reimbursement for the new facility because plaintiff was able to use the facility to sell product lines other than Kawasaki. The Magistrate, while

expressing doubts about receiving post-removal evidence, admitted such evidence for purposes of the record.

In the Report and Recommendation, the Magistrate found that the appropriate burden to be placed on the removing defendant is the preponderance of the evidence standard, citing Gafford v. General Electric Co., 997 F.2d 150 (6th Cir.1993). The Court agrees. The Magistrate Judge went on to conclude that the defendants' allegation in the notice of removal regarding the cost of the new facility was "conclusory", and did not satisfy the defendants' burden. The Magistrate Judge stated that, even if the evidence produced at the hearing were considered, the defendants had not cured this defect in their notice of removal.

Upon review, the Court first concludes that the referral to the Magistrate Judge, at least as contemplating an evidentiary hearing, was inconsistent with Laughlin. This is demonstrated by the Tenth Circuit's statement that "Kmart's economic analysis [of damages] . . . prepared after the motion for removal . . . does not establish the existence of jurisdiction at the time the motion was made." 50 F.3d at 873. In other words, the generation of post-removal evidence is of no effect.

The question remains what is the appropriate characterization of the notice of removal in this case. The following trio of principles exists: (1) the burden is on the removing party; (2) there is a presumption against removal jurisdiction; and (3) conclusory allegations are not sufficient. These principles mandate that removal not be permitted as a matter of routine. The

very concept of "preponderance of the evidence" means that "[t]he defendant must produce evidence that establishes that the actual amount in controversy exceeds [$75,000]." De Aguilar v. Boeing Co., 47 F.3d 1404, 1412 (5th Cir.1995)(emphasis added). Affidavits or other documentation is not absolutely required, but in a matter of "capital expenditures", as alleged here, this would seem the preferable form of proof.

Alternatively, if defendant seeks to rely solely upon allegations of underlying facts in the notice of removal, these allegations must rise to a level of specificity sufficient to overcome the presumption against removal. Here, defendants' alleged that it was "undisputed" that the amount of capital expenditures on the new facility exceeded $75,000. Absent a joint stipulation, an assertion that a matter regarding jurisdictional amount is "undisputed" is unhelpful, because the Court is restricted to examining the petition and the notice of removal. That is to say, a plaintiff's subsequent attempt to establish that a dispute does exist would be inappropriate under Laughlin.

Conclusory allegations which have been disapproved are such statements by a defendant as "the matter in controversy exceeds the jurisdictional amount". Cf. Gaus v. Miles, Inc., 980 F.2d 564 (9th Cir.1992). The Magistrate Judge appears to have concluded that the defendants' statement in the case at bar that the cost of the new facility exceeds the jurisdictional amount is not qualitatively different from other conclusory statements. The Magistrate Judge correctly stated that the notice of removal "itself contains no

factual allegations which would even establish the value of the new facility." (Report and Recommendation at 9). The defendants, of course, characterize their allegations as "non-conclusory" and argue that the allegations satisfy Laughlin.

The issue is not free from doubt, but after de novo review, the Court adopts the conclusion of the Magistrate Judge. Laughlin establishes that a removing defendant must achieve a level of specificity, beyond mere "notice pleading", to overcome the presumption against removal. A bald assertion that a certain item of damages exceeds the requisite jurisdictional amount is not sufficient.

It is the Order of the Court that the objection of the defendants (#16) to the Report and Recommendation is hereby denied, and the Court adopts the Report and Recommendation. The objection of the plaintiff to removal (#9), construed as a motion to remand, is hereby GRANTED. Pursuant to 28 U.S.C. §1447(c), this action is hereby remanded to the District Court of Delaware County, State of Oklahoma.

IT IS SO ORDERED this 30 day of December, 1998.

Terry C. Kern

TERRY C. KERN, Chief
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL EUGENE THOMPSON,)
)
Plaintiff,)
)
vs.) No. 97-CV-1041-K (J)
)
CITY OF JAY, ex rel DELMAR HARMON)
and JIM EARP,)
)
Defendants.)

ORDER

Plaintiff, appearing *pro se* and *in forma pauperis*, has filed this civil rights action pursuant to 42 U.S.C. § 1983, alleging that Defendants subjected him to cruel and unusual punishment, demonstrated deliberate indifference to serious medical needs, and violated his right to equal protection of the laws while he was incarcerated in the Delaware County Jail. For the reasons discussed below, the Court finds this case should be dismissed with prejudice as legally frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B).

BACKGROUND

As a preliminary matter, the Court notes that previously, on May 21, 1997, Plaintiff filed another civil rights complaint in this district court against defendants Delaware County Courthouse and the Delaware County Sheriff Department. That previous action, Case No. 97-CV-490-H, was based on the same or very similar incident of negligence giving rise to the instant claims, and was dismissed on June 27, 1997, for failure to state a claim upon which relief may be granted.

In the present action, Plaintiff alleges that "on or about August 28, 1997, Sherriff's [sic] Deputy was escorting me from court to the jail as is policy and practice in Jay, Oklahoma. We approached a stairwell, as is standard municipal policy for transporting pre-trial detainees to and from the courts, when I slipped and fell in standing water at the top of the flight of stairs. I fell completly [sic] down the stairs and broke my tailbone. The policy of escorting prisoners in such a way as is done is directly linked to the injury I sustained." (#1).

Plaintiff raises the following three claims in his instant civil rights complaint:

> Count 1: Cruel and unusual punishment. Supporting facts: "inadequate training of the officer in charge" of taking him up and down the stairs "in a dangerous condition";
>
> Count 2: Deliberate indifference to serious medical needs. Supporting facts: after seeing the doctor who "directed the Sherriff's [sic] dept. to provide [him] with extra padding for [his] bed," Plaintiff was provided 2 mattresses, but "it was repeatedly taken from me and subsequently returned days later. This happened five or six times."
>
> Count 3: Violation of equal protection and deliberate indifference to serious medical needs. Supporting facts: "on 8/26/96 I was taken to the hospital to be treated for a broken tailbone. While I was away all other prisoners were treated to prevent hepatitis A . . . I was not treated upon my return or during my absence."

(#1). In his prayer for relief, Plaintiff seeks $250,000 punitive damages, $200,000 pain and suffering, and $150,000 for medical expenses and future medical expenses.

ANALYSIS

Pursuant to 28 U.S.C. § 1915A, the "Screening" provision added to the *in forma pauperis* statute by the Prison Litigation Reform Act ("PLRA"), requires the Court to review a complaint brought by a prisoner seeking redress from a governmental entity or officer to determine if the

complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted. In addition the PLRA provides that a district court may dismiss an action filed *in forma pauperis* "at any time" if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. See 28 U.S.C. § 1915(e)(2)(B).

"The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 327 (1989)). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109. Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Id. A plausible factual allegation which lacks evidentiary support, even though it may not ultimately survive a motion for summary judgment, is not frivolous within the meaning of section 1915(e)(2)(B). Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991), the Court concludes that Plaintiff's allegations lack an arguable basis in law and should be dismissed pursuant to § 1915(e)(2)(B). These claims contain no more than conclusory, unsupported allegations. "Constitutional rights allegedly invaded, warranting an award of damages, must be specifically identified. Conclusory allegations will not suffice." Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981).

A. "Inadequate Training"/Municipal Policy Claim

It is well-established that "constitutional rights allegedly invaded, warranting an award of damages, must be specifically identified. Conclusory allegations will not suffice." Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981). In his first claim, Plaintiff alleges that "inadequate training of the officer in charge" and the municipal policy of "escorting prisoners" to and from the courts were "directly linked to the injury [] sustained." (#1). As a result of the "inadequate training," Plaintiff claims he was subjected to cruel and unusual punishment.[1]

Plaintiff has named as defendants Delmar Harmon, identified by Plaintiff as County Commissioner of Delaware County, and Jim Earp, Sheriff of Delaware County. However, the Court notes that plaintiff has failed to allege whether either Defendant was personally involved in the alleged violations at issue in this case. A defendant may not be held liable under § 1983 unless the defendant caused or participated in the alleged constitutional deprivation. Housley v. Dodson, 41 F.3d 597, 600 (10th Cir. 1994). Mere supervisory status, without more, will not create liability in a § 1983 case. Ruark v. Solano, 928 F.2d 947, 950 (10th Cir. 1991); Meade v. Grubbs, 841 F.2d 1512, 1527-28 (10th Cir. 1988).[2] Plaintiff in the instant case states that Defendant Earp was "in charge of the Jail and the officers who were detaining me." (#1). However, Plaintiff does not

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[1]It appears that Plaintiff was a pretrial detainee at the time of the incident giving rise to these claims. Under the Fourteenth Amendment's due process clause, pretrial detainees are entitled to the same degree of protection afforded convicted inmates under the Eighth Amendment's prohibition against cruel and unusual punishment. Martin v. Board of County Comm'rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990). Therefore, the Court will apply the "deliberate indifference" standard to Plaintiff's claims in this case.

[2]To state a claim against a supervisor, a plaintiff must allege facts which demonstrate the supervisor's personal involvement in the unconstitutional activities of his subordinates. For instance, a supervisor may be found liable (1) if after learning of the constitutional deprivation through a report or appeal, the supervisor failed to remedy the wrong; (2) if the supervisor created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue; or (3) if the supervisor was grossly negligent in managing the subordinates who caused the unlawful condition or event. See Williams v. Smith, 781 F.2d 319, 323-24 (2d Cir. 1986).

identify any connection between Defendant Earp and the allegedly unconstitutional policy of escorting pretrial detainees to the courthouse. Because mere supervisory status is insufficient to create § 1983 liability, the Court concludes Plaintiff's claims against Defendant Earp should be dismissed.

Similarly, Defendant Harmon cannot be held liable for the incidents alleged in the instant complaint. "Under Oklahoma law, the Board [of County Commissioners] has no statutory duty to hire, train, supervise or discipline the county sheriffs or their deputies." Meade, 841 F.2d 1512, 1528. Therefore, unless the commissioner voluntarily undertook responsibility for hiring or supervising county law enforcement officers, he will not be "affirmatively linked" with the alleged failure to protect. Id. In the case at bar, Plaintiff does not allege that Defendant Harmon voluntarily undertook responsibility for hiring or training the officers. Therefore, Plaintiff's claims against Defendant Harmon should be dismissed.

B. Deliberate Indifference to Serious Medical Needs Claims

To the extent Plaintiff alleges medical claims related to the incident at the courthouse, his claims fail since they do not rise to the level of a Fourteenth Amendment violation. Plaintiff's claims must be judged against the "deliberate indifference to serious medical needs" test as set out in Estelle v. Gamble, 429 U.S. 97 (1976); see also Martin, 909 F.2d at 406. That test has two components: an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 298-99 (1991). Neither negligence nor gross negligence satisfies the deliberate indifference standard required for a violation of the Eighth or Fourteenth Amendments.

Estelle, 429 U.S. at 104-05; Ramos v. Lam, 639 F.2d 559, 575 (10th Cir. 1980). In the instant case, Plaintiff complains in his second claim that the doctor treating his broken tailbone directed that he was to receive extra padding. Plaintiff states he was "to have two mattresses but it was repeatedly taken from me and subsequently returned days later." In addition, as his third claim, Plaintiff alleges that other inmates incarcerated at the Delaware County Jail were treated to prevent hepatitis A while he was in the hospital "to be treated for a broken tailbone" and that he never received the same treatment even though he had been exposed to the same conditions. Neither of these claims rise to the level of a constitutional violation. Even assuming Plaintiff's allegations are true, the Court concludes Plaintiff has not alleged he sustained substantial harm or suffered "a serious medical need" as a result of these incidents, nor has he alleged that Defendants acted with the requisite culpable state of mind. Therefore, Plaintiff has failed to allege facts in support of either prong of the Estelle standard. At best, Plaintiff's complaint states a claim for negligence on the part of prison officials. Negligence alone, however, is insufficient to establish a constitutional violation. Davidson v. Cannon, 474 U.S. 344, 347 (1986).

C. Equal Protection Claim

In support of his claim that Defendants violated the equal protection clause, Plaintiff complains that while he was at the hospital receiving treatment for a broken tailbone, other inmates at the Delaware County Jail received treatment necessitated by an alleged exposure to hepatitis A. According to Plaintiff, he never received the hepatitis A treatment even after he returned to the jail.

After viewing the information contained in the complaint in the light most favorable to Plaintiff, the Court concludes that Plaintiff has failed to even allege that Defendants intentionally or

purposefully discriminated against him, see Brisco v. Kusper, 435 F.2d 1046, 1052 (7th Cir. 1970) (the "Equal Protection Clause has long been limited to instances of purposeful or invidious discrimination rather than erroneous or even arbitrary administration of state powers"), or that he is a member of a protected group. Plaintiff's equal protection allegation is based simply on a single episode of an alleged deprivation of medical treatment. See Gamza v. Aquirre, 619 F.2d 449, 453 (5th Cir. 1980) (holding that "isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause"). Furthermore, Plaintiff does not allege that he suffered an adverse consequence as a result of the isolated episode. As a result, the Court finds that Plaintiff's equal protection claim is legally frivolous.

CONCLUSION

After careful review, and even under the liberal standards applicable to *pro se* plaintiffs, the Court concludes that Plaintiff's claims are legally frivolous and this action should be dismissed with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B). The Court further finds that Plaintiff could not prevail on the facts alleged and allowing him an opportunity to amend his complaint would be futile. Hall, 935 F.2d at 1110. The Clerk of Court should be directed to flag this dismissal as a "prior occasion" under 28 U.S.C. § 1915(g).[3]

[3]Section 1915(g) provides as follows:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is **dismissed with prejudice** as frivolous. The Clerk is directed to **flag** this dismissal as a "prior occasion" for purposes of 28 U.S.C. § 1915(g).

SO ORDERED THIS 30 day of December, 1998.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 31 1998

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JUAN CARLOS MONTES AND WILDER MONTES,	)	
PLAINTIFFS,	)	
v.	)	CASE NO. 98-CV-871-H
UNITED STATES OF AMERICA, *EX REL* DRUG ENFORCEMENT ADMINISTRATION,	)	
DEFENDANT.	)	

DOCKETED
DATE 4 1999

NOTICE OF DISMISSAL WITHOUT PREJUDICE

The Plaintiffs, Juan Carlos Montes and Wilder Montes, hereby give notice pursuant to Fed. R. Civ. P. No. 41 of their dismissal of this action, without prejudice.

Respectfully submitted,

BREWSTER, SHALLCROSS & DE ANGELIS

By: R A S

Richard A. Shallcross, OBA #10016
2021 South Lewis Avenue, Suite 675
Tulsa, Oklahoma 74104
(918) 742-2021

ATTORNEYS FOR PLAINTIFFS
JUAN CARLOS MONTES AND WILDER MONTES

Certificate of Mailing

I hereby certify that on the 31st day of December, 1998, a true and correct copy of the foregoing document was sent via U.S. Mail, with sufficient postage prepaid, to the following counsel: United States of America, Janet Reno, Attorney General, Department of Justice, 10th Street and Constitution Avenue, NW, Washington, D.C. 20530 and Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, 333 West 4th Street, Suite 3460, Tulsa, Oklahoma 74103.

RAS

Richard A. Shallcross

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MICHAEL EUGENE THOMPSON,)
)
Plaintiff,)
)
vs.) No. 97-CV-1041-K (J)
)
CITY OF JAY, ex rel DELMAR HARMON)
and JIM EARP,)
)
Defendants.)

ORDER

Plaintiff, appearing *pro se* and *in forma pauperis*, has filed this civil rights action pursuant to 42 U.S.C. § 1983, alleging that Defendants subjected him to cruel and unusual punishment, demonstrated deliberate indifference to serious medical needs, and violated his right to equal protection of the laws while he was incarcerated in the Delaware County Jail. For the reasons discussed below, the Court finds this case should be dismissed with prejudice as legally frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B).

BACKGROUND

As a preliminary matter, the Court notes that previously, on May 21, 1997, Plaintiff filed another civil rights complaint in this district court against defendants Delaware County Courthouse and the Delaware County Sheriff Department. That previous action, Case No. 97-CV-490-H, was based on the same or very similar incident of negligence giving rise to the instant claims, and was dismissed on June 27, 1997, for failure to state a claim upon which relief may be granted.

In the present action, Plaintiff alleges that "on or about August 28, 1997, Sherriff's [sic] Deputy was escorting me from court to the jail as is policy and practice in Jay, Oklahoma. We approached a stairwell, as is standard municipal policy for transporting pre-trial detainees to and from the courts, when I slipped and fell in standing water at the top of the flight of stairs. I fell completly [sic] down the stairs and broke my tailbone. The policy of escorting prisoners in such a way as is done is directly linked to the injury I sustained." (#1).

Plaintiff raises the following three claims in his instant civil rights complaint:

> Count 1: Cruel and unusual punishment. Supporting facts: "inadequate training of the officer in charge" of taking him up and down the stairs "in a dangerous condition";
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> Count 2: Deliberate indifference to serious medical needs. Supporting facts: after seeing the doctor who "directed the Sherriff's [sic] dept. to provide [him] with extra padding for [his] bed," Plaintiff was provided 2 mattresses, but "it was repeatedly taken from me and subsequently returned days later. This happened five or six times."
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> Count 3: Violation of equal protection and deliberate indifference to serious medical needs. Supporting facts: "on 8/26/96 I was taken to the hospital to be treated for a broken tailbone. While I was away all other prisoners were treated to prevent hepatitis A . . . I was not treated upon my return or during my absence."

(#1). In his prayer for relief, Plaintiff seeks $250,000 punitive damages, $200,000 pain and suffering, and $150,000 for medical expenses and future medical expenses.

ANALYSIS

Pursuant to 28 U.S.C. § 1915A, the "Screening" provision added to the *in forma pauperis* statute by the Prison Litigation Reform Act ("PLRA"), requires the Court to review a complaint brought by a prisoner seeking redress from a governmental entity or officer to determine if the

complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted. In addition the PLRA provides that a district court may dismiss an action filed *in forma pauperis* "at any time" if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. See 28 U.S.C. § 1915(e)(2)(B).

"The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 327 (1989)). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109. Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Id. A plausible factual allegation which lacks evidentiary support, even though it may not ultimately survive a motion for summary judgment, is not frivolous within the meaning of section 1915(e)(2)(B). Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991), the Court concludes that Plaintiff's allegations lack an arguable basis in law and should be dismissed pursuant to § 1915(e)(2)(B). These claims contain no more than conclusory, unsupported allegations. "Constitutional rights allegedly invaded, warranting an award of damages, must be specifically identified. Conclusory allegations will not suffice." Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981).

A. "Inadequate Training"/Municipal Policy Claim

It is well-established that "constitutional rights allegedly invaded, warranting an award of damages, must be specifically identified. Conclusory allegations will not suffice." Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981). In his first claim, Plaintiff alleges that "inadequate training of the officer in charge" and the municipal policy of "escorting prisoners" to and from the courts were "directly linked to the injury [] sustained." (#1). As a result of the "inadequate training," Plaintiff claims he was subjected to cruel and unusual punishment.[1]

Plaintiff has named as defendants Delmar Harmon, identified by Plaintiff as County Commissioner of Delaware County, and Jim Earp, Sheriff of Delaware County. However, the Court notes that plaintiff has failed to allege whether either Defendant was personally involved in the alleged violations at issue in this case. A defendant may not be held liable under § 1983 unless the defendant caused or participated in the alleged constitutional deprivation. Housley v. Dodson, 41 F.3d 597, 600 (10th Cir. 1994). Mere supervisory status, without more, will not create liability in a § 1983 case. Ruark v. Solano, 928 F.2d 947, 950 (10th Cir. 1991); Meade v. Grubbs, 841 F.2d 1512, 1527-28 (10th Cir. 1988).[2] Plaintiff in the instant case states that Defendant Earp was "in charge of the Jail and the officers who were detaining me." (#1). However, Plaintiff does not

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[1]It appears that Plaintiff was a pretrial detainee at the time of the incident giving rise to these claims. Under the Fourteenth Amendment's due process clause, pretrial detainees are entitled to the same degree of protection afforded convicted inmates under the Eighth Amendment's prohibition against cruel and unusual punishment. Martin v. Board of County Comm'rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990). Therefore, the Court will apply the "deliberate indifference" standard to Plaintiff's claims in this case.

[2]To state a claim against a supervisor, a plaintiff must allege facts which demonstrate the supervisor's personal involvement in the unconstitutional activities of his subordinates. For instance, a supervisor may be found liable (1) if after learning of the constitutional deprivation through a report or appeal, the supervisor failed to remedy the wrong; (2) if the supervisor created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue; or (3) if the supervisor was grossly negligent in managing the subordinates who caused the unlawful condition or event. See Williams v. Smith, 781 F.2d 319, 323-24 (2d Cir. 1986).

identify any connection between Defendant Earp and the allegedly unconstitutional policy of escorting pretrial detainees to the courthouse. Because mere supervisory status is insufficient to create § 1983 liability, the Court concludes Plaintiff's claims against Defendant Earp should be dismissed.

Similarly, Defendant Harmon cannot be held liable for the incidents alleged in the instant complaint. "Under Oklahoma law, the Board [of County Commissioners] has no statutory duty to hire, train, supervise or discipline the county sheriffs or their deputies." Meade, 841 F.2d 1512, 1528. Therefore, unless the commissioner voluntarily undertook responsibility for hiring or supervising county law enforcement officers, he will not be "affirmatively linked" with the alleged failure to protect. Id. In the case at bar, Plaintiff does not allege that Defendant Harmon voluntarily undertook responsibility for hiring or training the officers. Therefore, Plaintiff's claims against Defendant Harmon should be dismissed.

B. Deliberate Indifference to Serious Medical Needs Claims

To the extent Plaintiff alleges medical claims related to the incident at the courthouse, his claims fail since they do not rise to the level of a Fourteenth Amendment violation. Plaintiff's claims must be judged against the "deliberate indifference to serious medical needs" test as set out in Estelle v. Gamble, 429 U.S. 97 (1976); see also Martin, 909 F.2d at 406. That test has two components: an objective component requiring that the pain or deprivation be sufficiently serious; and a subjective component requiring that the offending officials act with a sufficiently culpable state of mind. Wilson v. Seiter, 501 U.S. 294, 298-99 (1991). Neither negligence nor gross negligence satisfies the deliberate indifference standard required for a violation of the Eighth or Fourteenth Amendments.

Estelle, 429 U.S. at 104-05; Ramos v. Lam, 639 F.2d 559, 575 (10th Cir. 1980). In the instant case, Plaintiff complains in his second claim that the doctor treating his broken tailbone directed that he was to receive extra padding. Plaintiff states he was "to have two mattresses but it was repeatedly taken from me and subsequently returned days later." In addition, as his third claim, Plaintiff alleges that other inmates incarcerated at the Delaware County Jail were treated to prevent hepatitis A while he was in the hospital "to be treated for a broken tailbone" and that he never received the same treatment even though he had been exposed to the same conditions. Neither of these claims rise to the level of a constitutional violation. Even assuming Plaintiff's allegations are true, the Court concludes Plaintiff has not alleged he sustained substantial harm or suffered "a serious medical need" as a result of these incidents, nor has he alleged that Defendants acted with the requisite culpable state of mind. Therefore, Plaintiff has failed to allege facts in support of either prong of the Estelle standard. At best, Plaintiff's complaint states a claim for negligence on the part of prison officials. Negligence alone, however, is insufficient to establish a constitutional violation. Davidson v. Cannon, 474 U.S. 344, 347 (1986).

C. Equal Protection Claim

In support of his claim that Defendants violated the equal protection clause, Plaintiff complains that while he was at the hospital receiving treatment for a broken tailbone, other inmates at the Delaware County Jail received treatment necessitated by an alleged exposure to hepatitis A. According to Plaintiff, he never received the hepatitis A treatment even after he returned to the jail.

After viewing the information contained in the complaint in the light most favorable to Plaintiff, the Court concludes that Plaintiff has failed to even allege that Defendants intentionally or

purposefully discriminated against him, see Brisco v. Kusper, 435 F.2d 1046, 1052 (7th Cir. 1970) (the "Equal Protection Clause has long been limited to instances of purposeful or invidious discrimination rather than erroneous or even arbitrary administration of state powers"), or that he is a member of a protected group. Plaintiff's equal protection allegation is based simply on a single episode of an alleged deprivation of medical treatment. See Gamza v. Aquirre, 619 F.2d 449, 453 (5th Cir. 1980) (holding that "isolated events that adversely affect individuals are not presumed to be a violation of the equal protection clause"). Furthermore, Plaintiff does not allege that he suffered an adverse consequence as a result of the isolated episode. As a result, the Court finds that Plaintiff's equal protection claim is legally frivolous.

CONCLUSION

After careful review, and even under the liberal standards applicable to *pro se* plaintiffs, the Court concludes that Plaintiff's claims are legally frivolous and this action should be dismissed with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B). The Court further finds that Plaintiff could not prevail on the facts alleged and allowing him an opportunity to amend his complaint would be futile. Hall, 935 F.2d at 1110. The Clerk of Court should be directed to flag this dismissal as a "prior occasion" under 28 U.S.C. § 1915(g).[3]

[3]Section 1915(g) provides as follows:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is **dismissed with prejudice** as frivolous. The Clerk is directed to **flag** this dismissal as a "prior occasion" for purposes of 28 U.S.C. § 1915(g).

SO ORDERED THIS 30 day of December, 1998.

TERRY C. KERN, Chief Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BETTY McCLURE,

Plaintiff,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 16 OF MAYS COUNTY, STATE OF OKLAHOMA, also known as the Salina Public School District; MARION STINSON, individually; LARRY MILLS, individually; DENNIS WESTON, individually; JOE BROWN, individually; BILLY RICE, individually,

Defendants.

No. 97-CV-825-B

JUDGMENT

In keeping with the Court's Findings of Fact and Conclusions of Law entered this date, judgment is hereby entered in favor of the Plaintiff, Betty McClure, and against the Defendant, Independent School District No. 16 of Mayes County, State of Oklahoma, also known as Salina Public School District, in the amount of Thirty-Seven Thousand Fifteen and 65/100 Dollars ($37,015.65). (Of said sum, Two Thousand Three Hundred Thirty-Four Dollars ($2,334.00), is to be paid by the Defendant into and on behalf of Plaintiff's retirement fund). The sum of Thirty-Seven Thousand Fifteen and 65/100 Dollars ($37,015.65), is to draw pre-judgment interest from February 1, 1997, until the date hereon at the rate of 6% per annum. Post-judgment interest is to run at the rate of 4.513%. Further,

11. Plaintiff's claim of bias by two Board members, Stinson and Weston, a factual issue, is mooted by the Court's Findings and Conclusions herein.

12. A separate Judgment in keeping with the Findings of Fact and Conclusions of Law shall be entered contemporaneously herewith.

DATED this 31st day of December, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:

EMMETT W. NICK and
DEANNA R. NICK,

Debtors,

OZARK FINANCIAL SERVICES, INC.,

Appellant,

vs.

EMMETT W. NICK and
DEANNA R. NICK,

Appellees.

Case No. 98-CV-236-E(M)

REPORT AND RECOMMENDATION

The instant appeal from the United States Bankruptcy Court for the Northern District of Oklahoma is before the undersigned United States Magistrate Judge for report and recommendation. Appellant, Ozark Financial Services, Inc. ("OFS"), appeals from a decision of the Bankruptcy Court denying its motion for administrative expense.

JURISDICTION AND STANDARD OF REVIEW

The District Court has jurisdiction over this appeal under 28 U.S.C. § 158. The Bankruptcy Court's legal conclusions are subject to *de novo* review. *Phillips v. White* (*In re White*), 25 F.3rd 931, 933 (10th Cir. 1994). The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540 (10th Cir. 1988); Bankr. Rule 8013.

PROCEDURAL HISTORY AND FACTS

The parties stipulated to the following facts before the Bankruptcy Court. OFS is the owner and holder of an installment contract and security agreement Debtors entered into for the purchase of a 1992 Kenworth T600B tractor. The Debtors' first Chapter 13 Plan, filed July 9, 1997, provided that OFS was to be treated as a secured creditor. Unsecured creditors were to be paid a 14.6% dividend from revenues generated from the use of the subject tractor and another tractor. On August 1, 1997, the tractor engine "blew up." The tractor was towed to a repair facility which estimated the cost of repair at $16,852.00. On September 3, 1997, Debtors filed an Amended Plan which proposed that the subject tractor be surrendered to OFS in satisfaction of the debt due and owing against the tractor. The Amended Plan proposed a 25% dividend to the unsecured creditors, paid from revenues generated by the remaining tractor.

OFS moved for allowance of an administrative expense under 11 U.S.C. § 503 in the amount of the $16,852.00 repair estimate. Based on the proposed surrender of the tractor to OFS, the Bankruptcy Court concluded:

> [A]ny repair expense would not benefit the debtors' estate but would merely prevent a loss to Ozark Financial Services. If that were to be paid, the parties who would truly bear that expense in this case would be the unsecured creditors. Therefore, it is my ruling that in the absence of a showing of an actual expense incurred and in the absence of a showing of substantial benefit to the estate, Ozark Financial Services's motion for allowance of administrative expense is denied.

[Dkt. 1, Item 59, p. 8, ln. 11-20].

On appeal OFS argues that the repair expense was "incurred" regardless of whether it had been paid, and that repair of the engine would benefit the estate.

DISCUSSION

Administrative expenses are specially favored post-petition claims which are given priority in asset distribution over most other claims against the bankruptcy estate. 11 U.S.C. § 503. Statutory priorities, such as administrative expenses, are narrowly construed. *In re Amarex*, 853 F.2d 1526, 1530 (10th Cir. 1988). To rise to the favored level of an administrative expense claim, it must fit within one of the categories listed in 11 U.S.C. § 503(b). The category possibly applicable to OFS' claim is 11 U.S.C. § 503(b)(1)(A) which grants administrative expense status to "the actual, necessary costs and expenses of preserving the estate . . . ."

The parties agree that *In re Mid Region Petroleum*, 1 F.3d 1130 (10th Cir. 1993) sets forth the appropriate test to be applied to determine whether an expense will qualify as an administrative expense under 11 U.S.C. § 503(b)(1)(A). [Dkt. 5, p. 2]. In *Mid-Region,* the Court identified two factors that must be met before an expense will be considered an administrative expense. It must (1) arise post-petition; and (2) it must benefit the estate in a real sense. An expense does not satisfy the benefit criteria if the expense confers only a potential benefit on the estate. *Id.* at 1133. The parties disagree whether the Bankruptcy Court appropriately applied that test to the stipulated facts of this case. Conclusions which follow from stipulated facts are legal conclusions which are reviewed de novo. *Id.* at 1132.

OFS argues that Debtors' use of the tractor to generate revenue for the 22 days between July 9 and August 1, when the engine blew up, was a substantial benefit to the estate. *Use* of the tractor may have been of benefit to the estate. However, under the *Mid Region* test, the appropriate question is whether the expense for which administrative expense treatment is sought (*i.e. repair* of the tractor) would be of benefit to the estate. After the engine break-down, Debtor concluded that repair and continued use of the tractor would not benefit the estate and therefore decided not to incur the repair expense. Instead, Debtor filed an Amended Plan which called for surrender of the subject tractor to OFS. It is apparent that an expenditure of $16,852 to repair the tractor and then surrendering it to OFS would not benefit the estate.

OFS urges this Court to apply the rationale of several cases in which repair expenses were allowed as administrative expenses. The Court is not persuaded that the principles espoused in the cases cited by OFS are controlling. OFS has cited *Reading Company v. Brown*, 391 U.S. 471, 88 S.Ct. 1759, 20 L.Ed.2d 751 (1968) as being analogous to the situation at bar. The *Reading* case is not a repair case. In *Reading,* the Court determined that damages resulting from the negligence of a receiver administering an estate under a Chapter 11 arrangement give rise to an "actual and necessary" cost of operating the debtor's business. *Id.* at 1767. The case is inapposite because there is no evidence in the present case that the engine blew up as a result of the debtor's negligence in failing to maintain the engine. Consequently, the holding in *Reading* is not germane to this case.

OSF also cites *United Trucking Service, Inc. v. Trailer Rental Co.*, 851 F.2d 159 (6th Cir. 1988). In that case an administrative expense was allowed for repairs where it was shown that the debtor failed to maintain and repair the subject equipment and used the money saved to continue operations. Again, there was no such showing in this case, so the *United Trucking* holding is not applicable.

The party claiming entitlement to administrative expense priority has the burden of proof. *Mid Region*, 1 F.3d at 1132. OFS presented no evidence of Debtors' negligence, but expects the Court to infer from the fact that the engine blew up that Debtors' maintenance of the engine was negligent. This Court finds no error in the Bankruptcy Court's failure to draw such an inference. Applying the principal that statutory priorities are to be narrowly construed, the Court finds that OFS has not met its burden of demonstrating that the transaction for which its claim is filed (repair of the tractor) would benefit the estate. Therefore, the Court concludes that the Bankruptcy Court correctly denied the claim for an administrative expense.

Appellant also challenges that portion of the Bankruptcy Court ruling which held that the repair expense had not actually been incurred. However, the question of whether the repair estimate is an expense that was actually incurred within the meaning of § 503(b)(1)(A) is not one this Court needs to address. Regardless of whether the expense was actually incurred, it cannot qualify for administrative expense treatment unless it benefits the estate.

CONCLUSION

The undersigned United States Magistrate Judge RECOMMENDS that the Bankruptcy Court decision denying OFS' motion for administrative expense be AFFIRMED.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of being served with a copy of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the factual findings and legal questions addressed in the report and recommendation of the Magistrate Judge. *Talley v. Hesse*, 91 F.3d 1411, 1412 (10th Cir. 1996), *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 31ST Day of December, 1998.

Frank H. McCarthy

Frank H. McCarthy
UNITED STATES MAGISTRATE JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing pleading was served on each of the parties hereto by mailing the same to them or to their attorneys of record on the 4 Day of January, 1999.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ANCHOR DRILLING FLUIDS U.S.A., INC., an Oklahoma corporation,	)	
Plaintiff,	)	
vs.	)	No. 98-C-391-B(M)
M-I L.L.C., a Delaware limited liability company,	)	
Defendant.	)	

ORDER

Before the Court are the Motion to Remand (Docket No. 2) and Renewed Motion to Remand (Docket No. 22) filed by Plaintiff Anchor Drilling Fluids U.S.A., Inc. ("Anchor Drilling") and the Motion to Transfer, Dismiss or Stay filed by Defendant M-I L.L.C. ("M-I") (Docket No. 3).

The dispute in this case arises from the sale and purchase of assets formerly held by defendant M-I's subsidiary, now known as Unibar Energy Services, Inc. On July 31, 1996 Defendant M-I entered into an Agreement for the Sale and Purchase of Assets (the "Purchase Agreement") with Plaintiff whereby Plaintiff agreed to acquire the "Purchased Assets" - the "inventory, fixed assets, business names, and intellectual property of SELLER free and clear of any and all liabilities." *Purchase Agreement ¶1.1(l) and Exhibit A.* At the closing of the sale on August 27, 1996, Plaintiff executed a Promissory Note in favor of M-I in the amount of $4,114,000.00 and the parties signed two other closing agreements, the "Blanket Sales

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Agreement"[1] under which M-I agreed to buy certain gas drilling fluid products from Plaintiff, and the "Barite Grinding Agreement" under which M-I agreed to perform barite ore grinding services for Plaintiff. *Purchase Agreement, Exhibit F, M-I's Exhibit 2; Blanket Sales Agreement, M-I's Exhibit 3; Barite Grinding Agreement, M-I's Exhibit 4.*

As a result of a dispute arising out of the above transaction, M-I filed a Request for Arbitration with the Secretariat of the International Chamber of Commerce ("ICC") International Court of Arbitration in Paris, France on April 15, 1998 pursuant to the "Dispute Resolution" clause in the Barite Grinding Agreement which states:

> All disputes arising in connection with this Agreement shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by arbitrators in accordance with said Rules. There shall be three arbitrators; each party shall select one arbitrator and the two arbitrators so selected shall select the third arbitrator, who shall be the Chief Arbitrator. The award of the arbitration shall be final, irrevocable and binding on the parties, without recourse to any court of law having jurisdiction over the parties. The arbitration proceedings shall be held in Houston, Texas.

Barite Grinding Agreement ¶14, M-I's Exhibit 4. On April 16, 1998, M-I then sued Anchor Drilling in the United States District Court for the Southern District of Texas Houston Division (the "Houston Court") seeking to compel Anchor Drilling to arbitrate M-I's claim for payment for services rendered under the Barite Grinding Agreement.

On May 5, 1998, Anchor Drilling sued M-I in Tulsa County district court alleging that M-I breached the Purchase Agreement and "ancillary agreements" which include the Barite Grinding Agreement, the Blanket Sales Agreement and an oral barite supply agreement (the "Oklahoma action"). *Anchor Drilling's Exhibit A.* Anchor Drilling also alleged M-I breached

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[1] The Blanket Sales Agreement was signed by Plaintiff (then "Jordan Drilling Fluids") and Federal Wholesale Drilling Mud, A Division of M-I Drilling Fluids, L.L.C.

the Purchase Agreement by seeking arbitration as the Tulsa County district court was the proper forum for the resolution of its dispute with M-I based on the "Governing Law" provision ¶7.3 of the Purchase Agreement which states:

> This Agreement shall be governed by and construed and enforced in accordance with the law of the State of Oklahoma, U.S.A., venue for any actions concerning this Agreement shall be only in Tulsa County, Oklahoma, and the State District Court of Tulsa County, Oklahoma shall have exclusive jurisdiction of any such actions.

Purchase Agreement ¶7.3, M-I's Exhibit 2.

In the Houston action, Anchor Drilling moved to dismiss M-I's claims asserting they were related to the Purchase Agreement and under ¶7.3 of that agreement, the claims had to be litigated in the state district court of Tulsa County. In response to Anchor Drilling's motion to dismiss, M-I amended its Petition to Compel and Complaint in the Houston action to seek arbitration of all claims arising not only under Barite Grinding Agreement, but also under the Purchase Agreement and the Blanket Sales Agreement, as well as all claims Anchor Drilling raised or could have raised in the Oklahoma litigation. Alternatively, M-I alleged a right to litigate in the Houston action its claim for payment of goods under the Blanket Sales Agreement. *M-I L.L.C.'s Amended Petition to Compel Arbitration and Amended Complaint, M-I's Exhibit 1.* Finally, M-I asserted that all disputes between the parties were subject to arbitration under the Barite Grinding Agreement.

On May 28, 1998, M-I removed the Oklahoma action to this Court based on diversity of citizenship under 28 U.S.C. §1332(a)(1). Subsequently, Anchor Drilling filed a motion to remand and M-I filed a motion to dismiss, transfer or stay. On October 13, 1998, the Court heard oral arguments on the pending motions and deferred ruling on the motions to await the Houston

Court's ruling on M-I's Amended Petition to Compel Arbitration and Anchor Drilling's motion to dismiss pending before that Court. The Houston Court ruled on these motions in its December 21, 1998 Order and Memorandum. Based on the Houston Court's ruling, Anchor Drilling renewed its motion to remand contending the forum selection clause, ¶7.3 of the Purchase Agreement, mandated remand of this case to Tulsa County district court.[2]

The Court agrees. The Houston Court rejected both parties' argument that the Purchase Agreement, Barite Grinding Agreement and the Blanket Sales Agreement were so closely related that the Court must construe them as a single contract and determine whether the arbitration clause in the Barite Grinding Agreement or the forum selection clause in the Purchase Agreement controlled resolution of all disputes between the parties. Rather, the Houston Court found the three agreements were separate and provide different procedures for resolution of disputes arising under the respective agreements: the Purchase Agreement requires that venue and jurisdiction for any action concerning the Purchase Agreement are in Tulsa County district court; the Barite Grinding Agreement requires arbitration of any disputes arising under that agreement; and the Blanket Sales Agreement simply provides that Oklahoma law governs the that agreement. *Houston Order, pp. 11-12.* Specific to this case, the Houston Court noted that although Anchor Drilling alleged breach of all three agreements as well as breach of an oral supply agreement in its Oklahoma action, its claims are based only on alleged breaches of the Purchase Agreement and the oral supply agreement. In so holding, the Houston Court denied M-I's motion to compel arbitration of these claims.

[2]In its December 29, 1998 Status Report, M-I requested a hearing to discuss the Order prior to this Court's ruling on the motions pending before it. The Court declines M-I's request for a hearing as the Order and Memorandum resolves the issues pertinent to the Court's ruling on the pending motions.

Consistent with the Houston Court's rulings, the Court concludes it is not the proper venue for the litigation of Anchor Drilling's claims in this case. Pursuant to ¶7.3 of the Purchase Agreement, "venue for any actions concerning this Agreement shall be only in Tulsa County, Oklahoma, and the State District Court of Tulsa County, Oklahoma shall have exclusive jurisdiction of any such actions." Accordingly, the case is hereby remanded to the state district court of Tulsa County, Oklahoma.

ORDERED this 31st day of December, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BETTY McCLURE,

Plaintiff,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 16 OF MAYS COUNTY, STATE OF OKLAHOMA, also known as the Salina Public School District; MARION STINSON, individually; LARRY MILLS, individually; DENNIS WESTON, individually; JOE BROWN, individually; BILLY RICE, individually,

Defendants.

No. 97-CV-825-B

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

This public school elementary principal employment termination case, alleging violation of the Fourteenth Amendment due process rights under 42 U.S.C. § 1983, came on for nonjury trial on December 21, 1998. After considering the pleadings, evidence, arguments and applicable legal authority, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

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1. Plaintiff, Betty McClure ("McClure"), commenced employment for Salina, Oklahoma Public Schools ("Salina") in Mayes County, Oklahoma, as an elementary principal in 1991.

2. McClure worked for Salina under annual, written employment contracts. In February of 1996, the Board of Education voted to renew McClure's contract for the following 1996-97 school year (July 1, 1996 to June 30, 1997). The contract had to be renewed annually by the Board of Education, Independent School District No. 16 of Mayes County, Oklahoma.

3. Prior to May 29, 1996, Tom Merritt was the superintendent of schools and McClure's immediate supervisor. Merritt resigned as superintendent on May 29, 1996. On July 10 or 11, 1996, Vol Woods ("Woods") was hired as the new superintendent of schools. Defendant Dennis Weston ("Weston") was the President of the Board of Education for Salina.

4. On July 29, 1996, Woods gave McClure written notice that cause might exist for her dismissal and that she was being suspended with pay.

5. On August 7, 1996, the Board of Education ("Board") voted to give written notice to McClure that cause might exist for her dismissal, to direct that the superintendent give her written notice of her right to request a hearing and to outline the reasons of possible dismissal.

6. On August 9, 1996, Woods sent McClure a letter outlining twelve possible

grounds that McClure be dismissed and also notifying McClure of her right to request a due process hearing.

7. In the letter of August 9, 1996, Woods outlined the following twelve reasons for the possible dismissal of McClure: "(1) School employees have smelled liquor on your breath during school hours; (2) you have violated the school district's no smoking policy by smoking on school grounds during regular school hours; (3) you have allowed and accompanied teachers off of the school grounds during regular school hours, when those teachers should have been attending to duties during their planning periods, for you and the teachers to smoke; (4) you have often left school grounds without permission; (5) the majority of teachers at the elementary school have lost confidence in your administrative leadership; (6) you are frequently gone from the school and are unavailable for assistance to teachers in your building; (7) you manage employees in front on {sic} other employees; (9) you have personally brought liquor onto the school premises; (10) you belittle and humiliate subordinate employees; (11) you have improperly reviewed personnel files of school district employees; and (12) the Board of Education lacks confidence in your abilities as an administrator."[1]

8. McClure received the letter from Woods outlining the possible grounds for

[1]At the August 29, 1996 hearing witnesses personally testifying or the record provided evidence in support of allegations (1), (2), (5), (6), (10) and (12). The record of the hearing states Plaintiff admitted the allegations in (9). (DX-14, p. 7)

dismissal on August 12, 1996. McClure contacted and met with her attorney, Sam Manipella, on August 12 or August 13, 1996, right after receiving the superintendent's recommendation. McClure replaced Manipella with another attorney, Phyllis Walta ("Walta"), on or about August 13, 1996.

9. On August 12, 1996, McClure wrote the clerk of the Board of Education a letter requesting that she be given a due process hearing. McClure also indicated to the clerk that she was represented by an attorney and asked that she be provided with a list of possible witnesses that might be called at the due process hearing by the administration.

10. On August 16, 1996, Woods wrote McClure a reply letter advising her that a due process hearing would be held on August 29, 1996. Woods also advised McClure to have her lawyer contact Doug Mann ("Mann"), the attorney who was representing the administration.

11. On Friday, August 16, 1996, at 7:01 p.m., McClure's lawyer, Walta, sent a letter by facsimile to Mann requesting a list of witness, various documents and additional details relating to the grounds for possible dismissal outlined in the superintendent's prior letter.

12. On August 10, 1996, Mann sent a letter to Walta addressing certain issues raised in her letter of August 16, 1996. In addition, Mann sent Walta, by overnight mail, copies of certain documents she had requested in her prior letter. Mann proposed that the parties exchange a list of witnesses on August 23, 1996.

13. On August 22, 1996, Walta sent Mann a letter requesting additional information, requesting additional details for the grounds for dismissal and asking for a continuance of the August 29, 1996 hearing. On the same day, Mann generally responded to the issues raised by Walta in her letter and indicated that the hearing would not be continued since school had started and a decision on whether McClure would remain as principal needed to be made as soon as possible.

14. On August 23, 1996, Mann sent Walta a letter by facsimile that outlined the names of potential witnesses that might be called by the administration at McClure's due process hearing to support the recommendation for dismissal. Mann identified which witnesses would testify to each of the possible grounds of dismissal outlined by the superintendent.

15. On August 26, 1996, Mann sent Walta, after regular business hours and by facsimile, copies of thirteen affidavits he intended to introduce as evidence at McClure's due process hearing.

16. On August 28, 1996, one day prior to the due process hearing, Walta faxed Mann a list of witnesses McClure intended to call to testify on her behalf. In addition to herself and the current superintendent, McClure listed six other individuals who might be called to testify.

17. On August 29, 1996, the Board of Education conducted a hearing on the proposed dismissal of McClure. McClure was present and represented by counsel Walta at

the hearing. Minutes of the meeting reflect Mann represented the administration at the hearing. At the hearing, McClure objected to participation by all five Board members due to bias against McClure, and particularly Billy Rice, based upon unspecified employment creating a conflict of interest. McClure also objected to Board members Stinson and Weston participation because they had expressed a bias against McClure. Mann advised any Board member who was biased or who could not decide the case based solely on the evidence to disqualify. None did so.

18. At the due process hearing, Mann called three witnesses to testify in person (Cathy Bennett, Janet Morgan and Judy Buster), all of whom were subjected to cross-examination by Walta. Bennett had been given a written admonishment and plan of improvement by McClure in March, 1996. Bennett became upset during her testimony and refused to answer further questions on cross-examination. Morgan is Bennett's daughter. Mann also submitted to the Board the testimony of Debbie Watkins, Renee Humphrey, Wanda Wade, Carmen Sanders, Janet Hall, Margie Pinkston, Kevin Kerns, Sandy Johnson, Vickie Harrison, Teresa Allen, Marsha Parker and Karen Davis by affidavit. Six of the people who had given affidavits were present in the audience at the hearing but refused to testify in person. Under state law, the Board of Education does not have subpoena power. Each affidavit was read to the Board of Education over the specific objection of McClure that she was denied the right of cross-examination. (While formal rules of evidence did not govern the proceedings, the hearing procedure did authorize the right of cross-examination.

See DX-14.) McClure was denied the right of cross-examination of these witnesses testifying by affidavit. Exhibits were introduced into evidence by both sides.

19. At the due process hearing, McClure called Woods, Mrs. Kinney, Leroy Cox, Evelyn Brown and Betty Mefford to testify on her behalf. McClure's witnesses were cross-examined by Mann. Plaintiff's witnesses in essence testified that in their opinion Plaintiff was a "good principal." Plaintiff also testified and stated the witnesses personally appearing against her were either mistaken or not telling the truth.

20. At the conclusion of the due process hearing, closing arguments were made and both McClure and the administration submitted proposed findings of fact. The Board then went into executive session to review the evidence. Mann did not go into executive session with the Board and did not take part in the deliberations. After returning to open session, the Board Members adopted detailed findings of fact and unanimously voted that cause existed to immediately dismiss McClure as elementary principal.

21. During 1994 and part of 1995, McClure worked on amending federal grant applications filed in prior years in an effort to secure more federal funding for the school district. As a result of the amended applications, Salina received approximately $1.7 million additional money from the federal government.

22. For the Board of Education meeting to be held on July 10, 1995, the following agenda item was posted for the meeting: Item 8: "Discussion and vote to approve or disapprove a remuneratory [sic] fee of two (2) percent to Betty McClure and Tammy Smith

on monies gained above and beyond the [sic] the previous years Impact Aid."

23. At the meeting of July 10, 1995, the Board of Education voted as follows: "Motion was made by Joe Brown and seconded by Dennis Weston to approve remuneratory [sic] fee of one (1%) for Betty McClure and Tammy Smith on all new monies gained above and beyond previous years Impact Aid. Joe Brown-Yes, Dennis Weston-Yes, Billy Rice-Yes, Morton Gann-No."

24. McClure was paid approximately $12,000 during the course of the 1995-1996 school year from the additional Impact Aid monies received by Salina during that school year.

25. The parties agreed McClure was due an additional sum of $4,780.75 as her share of the 1% Impact Aid payment.

26. Plaintiff does not seek reinstatement as she acquiesces in the school Board's claim such would be disruptive.

27. For many months following her termination, Plaintiff made application to public schools in an approximately 80 mile radius of Salina, Oklahoma. Although Plaintiff held Oklahoma public education certificates as an administrator (elementary principal), a psychometrist, and as a special education teacher, she did not apply for positions in special education. No administrator or psychometrics jobs were available.

28. Certified special education teachers are in greatest demand in the State of Oklahoma, even more so than math and science teachers.

29. Plaintiff's written contract for the 1996-97 school year provided for an annual salary of $40,400, of which she received 2/12ths thereof. For the 1996-97 school year, Oklahoma law authorized a mandatory teacher salary raise of $3,652.00 per year, but Plaintiff, as an administrator, was not entitled to such raise. For the 1996-97 school year, Plaintiff was entitled to $2,334.00 (10/12ths x $2,800.00), paid into her retirement fund, to $508.90 for health insurance and to $25.00 life insurance for 10/12ths of the year.

30. For the 1996-97 school year, Plaintiff had income of $4,000 from unemployment compensation and $300.00 for psychometry counseling work.

31. During the 1996-97 and 1997-98 school years, Plaintiff also received $15,000 and $35,000 income, respectively, as a consultant to the Locust Grove, Oklahoma school system regarding federal Impact Aid. This income should not be deducted or offset from any loss of elementary principal salary because it results from consulting work she could accomplish while off duty, and would not interfere with her duties as elementary school principal.

32. In November 1997, Plaintiff, age 53 years, took full retirement and now receives $1800.00 per month from her public school employment retirement. The school system's rule of eighty (27 years seniority, plus 53 years of age) entitled her to such retirement.

33. Plaintiff's employment mobility was somewhat restricted by the fact her husband was superintendent of the adjoining Wycliff School, from which he has now

retired.

34. Because of the considerable demand for certified special education teachers in Oklahoma, Plaintiff could probably have obtained such a teaching position, had she applied for the 1997-98 school year and following. While drawing retirement Plaintiff is limited to making $15,000 annually in any Oklahoma school system employment.

35. Plaintiff's emotional anxiety resulted principally from the charges against her and the admissible evidence offered in support thereof, rather than the denial of procedural due process regarding cross-examination.

36. There was admissible evidence to support the Plaintiff's termination independent of the evidence in the thirteen affidavits received in evidence. The thirteen affidavits were in essence cumulative of the testimony of the three administration witnesses that testified in person. However, Plaintiff was denied the right to confront and cross-examine many witnesses. At this juncture, it is speculative whether or not Plaintiff would have been terminated had that cross-examination been permitted.

37. The Plaintiff makes no claim of violation of a liberty interest protected by the Fourteenth Amendment.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this 42 U.S.C. § 1983 action pursuant to 28 U.S.C. §§ 1331 and 1343. Venue is proper pursuant to 28 U.S.C. § 1391(b).

2. Any Finding of Fact which might be properly characterized a Conclusion of

Law is incorporated herein.

3. The due process requirements of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), in connection with the dismissal of a full-time certified administrator and the property interests protected thereunder are codified in Okla.Stat.tit.70 § 6-101.13 (1991). *Hoerman v. Western Heights Board of Education*, 913 P.2d 684, 687 (Okla.Ct. App. 1995). Thus, Plaintiff has a constitutionally protected property interest as the elementary school principal of Independent School District No. 16 of Mayes County, State of Oklahoma.

4. A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133 (1955). The right to confront and cross-examine witnesses is basic to such a due process hearing. *Willner v. Committee On Character*, 373 U.S. 96 (1963), and *McGhee v. Draper*, 564 F.2d 902 (10th Cir. 1977).

5. Okla. Stat. tit. 70 §§ 6-101.13 and 6-101.14 (1991), provide for due process hearing and suspension procedures, respectively, where the "board of education ... has reason to believe that cause exists for dismissal of an administrator."

6. The Board of Education violated Plaintiff's procedural due process rights in denying the right of cross-examination regarding the thirteen witnesses' testimony offered by affidavit and the one witness, Bennett, who refused further cross-examination.

7. The Plaintiff is entitled to damages regarding the following:

1996-97 school year, 10/12ths of $40,400.00=	$33,667.00
1996-97 school year 10/12ths x $2800 (retirement)= (this sum is payable into the retirement fund)	2,334.00
Health insurance premium	508.80
Life insurance premium	25.00
1% agreed bonus amount	4,780.75
Total	$ 41,315.65

The following income received by Plaintiff during the 1996-97 school year is to be deducted therefrom:

Psychometry consulting	$ 300.00
Unemployment compensation	4,000.00
Total net	$37,015.65

Wulf v. City of Wichita, 883 F.2d 842, 870-71 (10th Cir. 1989).

8. The Court concludes Plaintiff is entitled to nominal damages of $1.00 for mental pain and suffering. Plaintiff's mental pain and suffering primarily related to the admissible evidence concerning the charges, rather than the denial of procedural due process. *Carey v. Piphus,* 435 U.S. 247 (1978).

9. The Court concludes that following the 1996-97 school year Plaintiff could have obtained employment as a special education teacher, and thus mitigated her damages. *Wilson v. Union Pacific R.R.,* 56 F.3d 1226, 1232 (10th Cir. 1995), and *EEOC v. Sandia Corp.*, 639 F.2d 606, 627 (10th Cir. 1980).

10. Plaintiff's *pendente* claim of breach of contract is moot in view of the Court's Findings and Conclusions herein.

11. Plaintiff's claim of bias by two Board members, Stinson and Weston, a factual issue, is mooted by the Court's Findings and Conclusions herein.

12. A separate Judgment in keeping with the Findings of Fact and Conclusions of Law shall be entered contemporaneously herewith.

DATED this 31st day of December, 1998.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE